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Supreme Court, U.S.
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No. 03-790

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IN THE

Supreme Court of the United States

SAFETY NATIONAL CASUALTY CORPORATION,

Petitioner,

v.

DOW CORNING CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court, in advancing the federal policy favoring binding arbitration under the Federal Arbitration Act, has held a court's role in an arbitration is limited to matters of "arbitrability," with all other questions reserved for the arbitrator, including "what *kind of arbitration proceeding the parties agreed to*." *Green Tree Fin. Corp. v. Bazzle*, __ U.S. __, 123 S. Ct. 2402, 2407 (2003) (emphasis in original). Once a court concludes the parties are subject to an agreement to arbitrate their dispute, the arbitrator decides all procedural questions that bear on its "final disposition." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). In the Eighth Circuit, which held the arbitrators in this case were without authority to declare their decision to be binding, "arbitrability" is not a portal to arbitration, but rather a roadblock, and a gateway to litigation.

The questions presented are:

1. Is arbitration binding or a threshold to litigation? The Eighth Circuit held the later.

2. Does an arbitration panel or a court decide whether arbitration is binding? The Eighth Circuit held the later.

3. Are the findings of fact by an arbitration panel or a district court entitled to deference or may a federal court of appeals develop its own view of the facts? The Eighth Circuit held the later.

STATEMENT UNDER RULE 29.6

Petitioner Safety National Casualty Corporation and Respondent Dow Corning Corporation are the parties to this proceeding.

Petitioner Safety National Casualty Corporation states that Delphi Financial Group, a publicly held company, holds 100% of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Safety National Casualty Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case in order to preserve arbitration as an alternative to litigation and to resolve the conflict between the Eighth Circuit's opinion and the Court's decision in *Green Tree Fin. Corp. v. Bazzle*, __ U.S. __, 123 S. Ct. 2402 (2003), amongst other important issues.

OPINIONS BELOW

The district court's memorandum and order (per Hamilton, D.J.) denying Respondent Dow Corning Corporation's motion to vacate the arbitration decision is unpublished and appears at Pet. App. 20a-85a. The opinion of the United States Court of Appeals for the Eighth Circuit (per Loken, C.J., joined by Fagg, and Arnold, JJ.) is reported at 335 F.3d 742 (8th Cir. 2003). Pet. App. 1a-19a. The Eighth Circuit's order denying rehearing and rehearing *en banc* is not otherwise published. Pet. App. 96a.

STATEMENT OF JURISDICTION

The Eighth Circuit's judgment was entered on July 9, 2003. Pet. App. 1a. The Eighth Circuit entered an order denying a timely petition for rehearing and rehearing *en banc* on August 28, 2003. Pet. App. 96a.

Petitioner invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, mandates the enforcement of the terms of arbitration agreements contained in contracts evidencing transactions in interstate commerce. Under section 2 of the FAA, arbitration agreements shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

STATEMENT OF THE CASE

Insurance policies commonly have arbitration provisions; Safety's policies do.

Safety issued three excess umbrella insurance policies to Dow Corning Corporation for the period December 1, 1983, to December 1, 1984. Pet. App. 2a. The policies, which afforded coverage of $9.15 million, included a mandatory arbitration provision, which provided:

> As a condition precedent to any right of action under this Policy, any dispute arising out of this Policy shall be submitted to a board of arbitration. . . .

Pet. App. 4a-5a. The provision specified that the "members of the board shall be active or retired, disinterested officials of insurance or reinsurance companies," and required the board to "make its decision with regard to the custom and usage of the insurance and reinsurance business." *Id.* 5a.

Dow Corning sought coverage under Safety's policies for breast implant claims. In 1998, Dow Corning and Safety submitted their dispute to arbitration.

Per the parties' agreement, the three-member panel of arbitrators was comprised of one member selected by Dow Corning, one member selected by Safety, and an umpire. Pet. App. 21a. After a four-day hearing, the arbitrators issued their decision. *Id.* 86a-90a. They unanimously declared their decision to be binding on both parties. *Id.* 86a, 89a. They also unanimously ruled for Dow Corning and against Safety on Safety's defenses based on late notice and material misrepresentation. *Id.* 88a, 89a. Finally, in a two-one decision, they ruled for Safety and against Dow Corning on certain coverage issues. *Id.* 86a-87a, 89a.

Following the arbitrators' decision, Dow Corning filed a motion to vacate in the United States District Court for the Eastern District of Missouri. The district court, which had jurisdiction under 28 U.S.C. § 1332 and 9 U.S.C. § 10(a), denied Dow Corning's motion. Pet. App. 20a-21a.

Dow Corning appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit concluded the parties had agreed to mandatory, but non-binding arbitration. Pet. App. 6a. In modifying the district court's judgment that the parties had agreed to binding arbitration, the Eighth Circuit found the arbitrators had "doubtlessly exceeded their authority in declaring their decision to be binding, because that issue goes to the scope of their authority." *Id.* 8a.

This petition for a writ of certiorari followed after the Eighth Circuit denied Safety's timely filed petition for rehearing and rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

I. There Is No Such Thing As Non-Binding Arbitration.

The question presented is one of great importance to all parties to arbitration agreements and in particular to the insurance industry which resolves by binding arbitration billions of dollars of disputes quietly, efficiently, and without enormous expense. The Eighth Circuit's opinion will be precedent for all "losers" to contend that arbitration is a prelude to litigation. From the Eighth Circuit's decision, challenges to the binding nature of arbitration will be *de rigueur*. This seed should not be allowed to germinate.

The Eighth Circuit found Dow Corning and Safety were parties to a valid arbitration agreement that called for mandatory arbitration of their insurance coverage dispute. Pet. App. 6a. The Eighth Circuit acknowledged the "federal policy favors arbitration, and that [the policy] normally means binding arbitration." *Id.* However, in concluding the arbitrators' decision was not binding, the Eighth Circuit ignored the federal policy, its own precedent, the decisions of other circuit courts of appeal, and the universally accepted understanding that arbitration provides for the final and binding resolution of disputes. Without citation to any authority, the Eighth Circuit held the federal policy has no application to disputes involving insurance. *Id.*

The Court should grant certiorari to decide once and for all whether there is non-binding arbitration under the FAA. The Court should make uniform the rule and declare all arbitrations under the FAA binding once a court resolves the "gateway" question of arbitrability in favor of arbitration based on the existence of a valid and applicable agreement to arbitrate.

A declaration of a uniform presumption for binding arbitration is necessary to protect the federal policy from encroachments upon arbitrator authority by the courts. The Eighth Circuit's decision will thwart the arbitration of disputes and encourage litigation. There is no economic incentive to participate in an arbitration proceeding that would be no more than advisory.

A uniform presumption in favor of binding arbitration is consistent with the Court's precedent. The Court has repeatedly declared that once a court finds there is an enforceable agreement to arbitrate, the court has no further role, and all other questions are for the arbitrator to decide, including procedural issues that bear on the dispute's "final disposition." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964).

Consistent with the Court's decisions, the Eighth, Fourth, Fifth, Seventh, and Tenth Circuits have held the federal policy contemplates *binding* arbitration. The Eighth Circuit, contrary to its decision in this case, has held a valid arbitration award "carrie[s] with it *an implied agreement to be bound*." *Wabash Ry. Co. v. American Refrigerator Transit Co.*, 7 F.2d 335, 351 (8th Cir. 1925) (emphasis added).[1] The Fourth Circuit has held there is a judicial "presumption that one

1. The seed planted by the Eighth Circuit has already sprouted. Citing its decision in this case, the Eighth Circuit in *Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp.*, No. 03-1092, 2003 WL 22391526 (8th Cir. Oct. 21, 2003), again held that arbitrators had no authority to declare their decision to be binding. The Eighth Circuit's *Shook & Fletcher* opinion appears at Pet. App. 97a-99a. On November 24, 2003, the Eighth Circuit denied rehearing and rehearing *en banc* in the case.

submits to arbitration, as opposed to mediation, precisely *because of* the binding quality of the process." *Rainwater v. National Home Ins. Co.*, 944 F.2d 190, 192 (4th Cir. 1991) (emphasis in original). The Fifth Circuit has observed the federal policy favoring arbitration "encompasses an expectation that such procedures will be binding." *McKee v. Home Buyers Warranty Corp. II*, 45 F.3d 981, 985 (5th Cir. 1995). The Seventh Circuit has held an arbitration agreement is "a contractual commitment to abide by the arbitrator's interpretation." *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991). The Tenth Circuit presumes an arbitration is intended by the parties to be the exclusive means of resolving their disputes under a contract. *P & P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 866 (10th Cir. 1999).

The federal policy for binding arbitration comports with the term's common and ordinary meaning. Non-binding arbitration is an oxymoron. BLACK'S LAW DICTIONARY defines "arbitration" as "[a] method of dispute resolution involving one or more neutral third parties who are usu. agreed to by the disputing parties and whose decision is binding. – Also termed (redundantly) *binding arbitration*." BLACK'S LAW DICTIONARY 100 (7th ed. 1999) (emphasis in original). *See also* BRYAN A. GARNER, DICTIONARY OF MODERN LEGAL USAGE 73 (2d ed. 1995) ("The results of arbitration are binding – that is, the parties to the arbitrator's decision are bound by it.")

There is an expectation in the marketplace that arbitration brings finality to disputes.

> *Every [arbitration] award rendered in compliance with all legal requirements is a complete and*

> *binding determination of a controversy* and may not be disturbed except on equitable or statutory grounds. . . . *The award is conclusive on all matters submitted to the arbitrators. When the parties choose to adjust their disputes through the arbitral process, the award is final* and, under such an agreement, neither party can hope again to litigate the same points successfully.

21 RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS BY SAMUEL WILLISTON, § 57:115 at 587 (4th ed. 2001) (footnotes omitted) (emphasis added).

"The object of arbitration is to achieve a *final disposition* of the differences between the parties in an easier, more expeditious, and less expensive manner than by litigation." 20 JOHN ALAN APPLEMAN, ET AL., INSURANCE LAW AND PRACTICE, § 11431 at 592 (West 1972) (emphasis added). Unlike mediation, "the essence of the arbitration process is that an arbitral award shall put the dispute to rest." Comment, *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality*, 23 UCLA L. REV. 936, 948-49 (1976). Even in the absence of an express agreement making the arbitration final and binding, "conclusiveness is expected." *Id.*

The very meaning of the term "arbitration" connotes a final and binding award. MARTIN DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION, § 1.01 at 1 (1968). Arbitration's defining characteristic is a final and binding disposition of a controversy or dispute. THOMAS H. OEHMKE, COMMERCIAL ARBITRATION, § 2.1 at 15 (1987). As noted by the Ohio Supreme Court:

> "Binding arbitration" is a redundancy. "Nonbinding arbitration" is a contradiction in terms. For a dispute

> resolution to be classified as "arbitration," the decision rendered must be final, binding and without qualification or condition as to the finality of an award whether or not agreed to by the parties.

Schaefer v. Allstate Ins. Co., 590 N.E.2d 1242, 1245 (Ohio 1992).

The expectation in the insurance context is no different. Insurance is a business in interstate commerce. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 539 (1944). Therefore, an agreement to arbitrate an insurance dispute is no less subject to the federal policy under the FAA for binding arbitration than any other contract.

Insurance custom and usage demonstrate insurance-related arbitrations are meant to be binding.

> Arbitration clauses are common in insurance contracts. They have been included in insurance policies for many years. . . . In most cases, private agreements to arbitrate involve binding arbitration. The parties seek to avoid costly, time-consuming litigation by agreeing to submit all disputes for binding decision by an arbitrator or panel of arbitrators.

AMERICAN ARBITRATION ASS'N, INSURANCE ADR MANUAL, § 4.03 at 57 (1993). "Parties generally appreciate the advantage of arbitral finality and recognize that appeals will delay the ultimate resolution of the dispute." *Id.* at § 6.25 at 122. "In general, a very high degree of finality is accorded to most arbitration decisions." ROBERT E. KEETON, ET AL., INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES, at 1091 (1988).

Further, in this case and *Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp.*, which involved an identical arbitration clause, two separate arbitration panels – six different arbitrators in all – following "the custom and usage of the insurance and reinsurance business," unanimously concluded their decisions were binding. Pet. App. 5a, 98a.

The FAA permits private parties to "'trade[] the procedures . . . of the courtroom for the simplicity, informality, and expedition of arbitration,'" which is usually cheaper and faster than litigation. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (citing H.R. REP. No. 97-542, 97th Cong., 2d Sess. 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 765, 777). There is no trade, and the federal policy is emasculated, when a reviewing court ignores the arbitrators' findings and sends the parties to litigation after they have devoted significant time and resources to arbitration.

Dow Corning and Safety have been involved in this insurance coverage dispute since 1993. They have been in arbitration for five years. They have spent collectively hundreds of thousands of dollars to resolve their differences. They have litigated in Michigan state court. They have been to the district court three times and the Eighth Circuit twice. Although they agreed to arbitrate *all* disputes arising out of the policies, their arbitration has become nothing more than a precondition – an expensive "dry run" – to what will likely be protracted and costly litigation.

Absent review by the Court, Dow Corning and Safety, as well as similarly situated parties, in both the insurance and non-insurance context, will be faced with the empty gesture of non-binding arbitration as a prelude to litigation, a consequence that defeats the very object of the liberal federal policy behind the FAA. As the Eighth Circuit's decision undermines the federal policy favoring binding arbitration, certiorari should issue so the Court may declare a uniform presumption for binding arbitration in every arbitration agreement subject to the FAA.

II. The Eighth Circuit's Decision Conflicts With The Court's Most Recent Decision Addressing The Scope Of Arbitrator Authority, *Green Tree Fin. Corp. v. Bazzle.*

One consistent theme emerges from the Court's arbitration decisions: the jealous protection of the federal policy favoring the resolution of disputes by binding arbitration. "The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

In advancing this policy, the Court has limited the role of the courts to "gateway" questions of arbitrability. *Pacificare Health Systems, Inc. v. Book*, __ U.S. __, 123 S. Ct. 1531, 1536 n.2 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002). "Arbitrability" concerns the very narrow issue whether an agreement creates a duty for the parties to arbitrate a particular dispute. *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986). Where, as here, the parties have agreed to submit "any dispute" arising out of their agreement to arbitration, the court's function is "confined"

to the "very limited" role of ascertaining whether the claim is subject to the contract. *United Steel Workers of America v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960).

Once the court concludes the dispute is arbitrable, all other questions are for the arbitrator to resolve, including procedural questions that grow out of the dispute and which affect its "*final disposition.*" *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) (emphasis added). Once a court finds the parties have agreed to arbitrate their dispute, "the court will have exhausted its function, except to order the reluctant party to arbitration." *United Steel Workers of America v. American Mfg. Co.*, 363 U.S. 564, 571 (Brennan, J., concurring).

The Eighth Circuit's decision conflicts with these precepts of arbitration jurisprudence. In opposition to the Court's repeated decisions limiting the courts' role to the "gateway" issue of arbitrability, the Eighth Circuit has authorized the courts to decide matters of contract interpretation and arbitration procedure, including the power to decide what kind of arbitration the parties have agreed to, under the guise that these issues go to the scope of arbitrator authority. Certiorari is necessary to preserve the last twenty years of arbitration jurisprudence which promotes the federal policy for binding arbitration by reserving for arbitrators all issues, except for the narrow question whether the parties have agreed to arbitrate their dispute.

A. "What Kind Of Arbitration Proceeding The Parties Agreed To" Is Not An Issue Of "Arbitrability."

The Court's pronouncement that arbitrability is an issue for the courts has been heard and understood by the judiciary. However, the Court's mandate limiting "arbitrability" questions to "gateway" issues has not been heeded. This case presents the opportunity for the Court to quell once and for all expansive interpretations of arbitrability that conflict with the Court's precedent and undermine the federal policy for binding arbitration.

The Eighth Circuit, in this case and *Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp.*, No. 03-1092, 2003 WL 22391526 (8th Cir. Oct. 21, 2003), held the issue whether the parties contracted for binding or non-binding arbitration went to the scope of the arbitrators' authority and was therefore beyond their authority to resolve. Pet. App. 8a; *Shook & Fletcher*, 2003 WL 22391526 *1; Pet. App. 98a-99a. Similarly, the Third Circuit has held that "because the court must determine the duty to arbitrate from an interpretation of the collective bargaining agreement, it also has the task of determining the dispositive effect to be given to an award – again, by construing the contract." *Orlando v. Interstate Container Corp.*, 100 F.3d 296, 300 (3d Cir. 1996). These decisions misinterpret the term "arbitrability" and usurp for the courts questions that are the exclusive province of arbitrators.

These decisions by the Eighth and Third Circuits conflict with the Court's most recent arbitration decision, *Green Tree Fin. Corp. v. Bazzle*, __ U.S. __, 123 S. Ct. 2402 (2003), which was decided two weeks before the Eighth Circuit's decision in this case. However, the Eighth Circuit, in this

case and *Shook & Fletcher*, did not address the Court's decision in *Green Tree*, which removes all doubt that the arbitrators acted within their authority in deciding what type of arbitration the parties had agreed to, including whether the proceeding was binding or not.

In *Green Tree*, the Court addressed the judiciary's limited role in arbitrations when it considered the interplay between class actions and arbitrations. The parties' agreement, a broad-form arbitration clause, provided for the arbitration of "'[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract.'" 123 S. Ct. at 2407. In vacating the lower court's decision, the Court held that although the contract did not mention class actions by name, it was for the arbitrator, rather than for the court, to decide whether the contract contemplated class action arbitration. *Id.* The Court concluded the dispute over class action arbitration did not come within the "limited circumstances" where courts assume the parties intended a court, and not an arbitrator, to decide a particular arbitration matter. *Id.* The Court held this "narrow exception" did not apply to the parties' dispute because their conflict did not concern the arbitration clause's validity or its application to the dispute. *Id.*

The Court distinguished between questions of arbitrability, which are for the courts to decide, and questions of substance and procedure, which are for the arbitrators to decide. The Court held the parties' dispute – whether the contract permitted class action arbitration – went to "what *kind of arbitration proceeding* the parties agreed to." *Id.* (emphasis in original). Thus, as the question concerned "contract interpretation and arbitration procedures," the

Court held the issue was one for the arbitrators to decide. *Id.* The Court explained:

> Arbitrators are well situated to answer that question. Given these considerations, along with the arbitration contracts' sweeping language concerning the scope of questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide.

Id.

The oral argument transcript from *Green Tree* demonstrates it was the Court, not the parties, which steered resolution of the dispute into the arbitrators' domain. Justice Breyer asked: "Well, . . . if it's disputable, why shouldn't the arbitrator decide that?" *Green Tree Fin. Corp. v. Bazzle*, 2003 WL 1989562, Oral Argument at 19 (Apr. 22, 2003). Green Tree's counsel took the position that the question (whether the arbitration clause covered class actions) went to the core of the arbitrator's authority and thus should not be decided by the arbitrator. Justice Breyer disagreed:

> No, but wait. There is a case, including one I just wrote, I think, for the Court which makes very clear that what you send to the arbitrator – I mean, there are dozens of cases where you have a phrase in a contract, and that's in dispute, and the parties have agreed we send disputes about the meaning of the contract to arbitration, you send that to the arbitrator.

> I mean, the only things that you don't are whether there's the arbitration contract is itself valid, et cetera. . . .
>
> What I have in front of me is a contract. It says, in this phrase, disputes will be arbitrated, there is a question, what does that mean, that word arbitration in this contract, and then I know that the parties have agreed to arbitrate the meaning of the dispute, all right – of any phrase – including that one.

Id. at 20-22.

The Court's *Green Tree* decision compels only one conclusion in this case. The arbitrators acted within their authority when they decided the parties' contracts called for binding arbitration. This question did not concern a "gateway" matter of arbitrability. The validity of the arbitration clause or its application to the dispute was not at issue. Indeed, the Eighth Circuit found the clause required mandatory arbitration of the parties' controversy. Pet. App. 6a.

The parties' agreement provided that "any dispute arising out of this Policy" would be arbitrated. Pet. App. 4a-5a. There was a question between the parties about whether the word "arbitration" meant a binding or non-binding result. That is a question of "what *kind of arbitration proceeding* the parties agreed to." *Green Tree Fin. Corp.*, 123 S. Ct. at 2407 (emphasis in original). Thus, the issue was properly decided by the arbitrators. Indeed, the issue preserved for the arbitrators in *Green Tree* (whether the arbitrators had the power to hear a class action) is closer to a question of

"the scope of their authority" than the issue whether Safety and Dow Corning had agreed to final and binding arbitration. The arbitrators here did not decide the scope of their authority; they decided whether Safety and Dow Corning had agreed that they would next go to court to argue about the arbitration award itself or to argue about the coverage issues on the merits.

The Eighth Circuit overstepped its bounds, in violation of the Court's directions, by deciding the binding/non-binding issue itself. The very words used by the Eighth Circuit betray that the court was treading where it should not go. Addressing the "condition precedent" language, the Eighth Circuit wrote: "Though the clause suggests that arbitration of a policy dispute will be followed by litigation, and thus is non-binding, like the district court *we do not find this textual clue conclusive*. It can also be read as simply recognizing that even binding litigation is often followed by litigation." Pet. App. 5a (emphasis added). The Eighth Circuit took it upon itself to "determine whether the parties to these 1983 excess liability insurance policies intended to contract for binding arbitration." *Id.* In so doing, the court openly engaged in contract interpretation. However, that task is reserved for arbitrators. *Green Tree Fin. Corp.*, 123 S. Ct. at 2407. Once a court finds the parties have agreed to arbitrate their dispute, questions of contract interpretation are for the arbitrator to decide. *American Steel Workers*, 363 U.S. at 567-68; *AT & T Technologies, Inc.*, 475 U.S. at 651.

The Eighth Circuit's reliance on the Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), in support of its conclusion that the arbitrators were without authority to declare their decision to be binding is misplaced and confuses the nature of an arbitrability

determination. Pet. App. 8a. In *First Options*, a case where there was a question whether an arbitration agreement existed, the Court held only that courts have "primary authority to decide whether a party has agreed to arbitrate." 514 U.S. at 942.

Any doubt about the narrowness of the Court's decision in *First Options* was dispelled by the Court's subsequent decisions in *Pacificare Health Systems, Inc. v. Book*, __ U.S. __, 123 S. Ct. 1531 (2003), and *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). In both cases, the Court held "the phrase 'question of arbitrability' has a . . . limited scope" and applies to "gateway" issues only. *Pacificare Health Systems, Inc.*, 123 S. Ct. at 1536 n.2; *Howsam*, 537 U.S. at 83-84. In *Howsam*, the Court ruled that a dispute over the limitation period for bringing an arbitration was for the arbitrator, and not the court, to decide. *Id.* at 85. The Court explained the application of the time limit at issue was not a "gateway" question of arbitrability. *Id.*

Here, there were no issues of arbitrability. The Eighth Circuit found the parties were subject to a valid arbitration agreement that called for mandatory arbitration of all disputes arising out of the insurance policies. Pet. App. 6a. Therefore, the Eighth Circuit's decision conflicts with *Howsam*, which held that all procedural questions affecting a dispute's final disposition are "presumptively" for the arbitrator to decide. 537 U.S. at 84. For "[o]nce it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its *final disposition* should be left to the arbitrator." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) (emphasis added).

For these reasons, the Eighth Circuit's decision calls forth the need for the Court's plenary review. The Eighth Circuit's decision conflicts with the Court's leading arbitration decisions by usurping the arbitrators' authority to decide matters of contract interpretation and arbitration procedure and granting to itself the power to decide what the parties intended when they entered into their contracts. As the Eighth Circuit's decision is in direct conflict with this Court's dictates concerning the limited the scope of "arbitrability" questions, certiorari should issue.

B. The Question Whether Arbitrators Have The Authority To Decide "What Kind Of Arbitration Proceeding The Parties Agreed To" Presents An Important And Recurring Issue That Warrants The Court's Review Because The Issue Will Impact The Resolution Of Countless Important Disputes.

In two ways, this case has future and practical significance and warrants the Court's review. Rather than confining the courts' role in arbitrations to "gateway" questions of "arbitrability," the Eighth Circuit's decision makes arbitration nothing more than a prelude to litigation and calls into question the efficacy of common-place, broad-form arbitration clauses, which are typical in many types of commercial agreements, including insurance policies and reinsurance treaties.

1. The Eighth Circuit's decision has far reaching consequences.

The Eighth Circuit's opinion that it, rather than the arbitrators, has the authority to decide what the parties meant by their contractual agreement to arbitrate has far-reaching consequences. The immediate violence done by the Eighth Circuit's decision is that it has ruled that an appellate court, rather than a panel of arbitrators, is the entity that should decide the parties' intentions. The big-picture result of that conclusion is that arbitration loses its position as an effective dispute resolution mechanism.

The Eighth Circuit's decision is especially injurious to parties to insurance contracts and reinsurance treaties. With no citation to authority and no factual support, the Eighth Circuit's ruling excepts insurance coverage disputes from the federal policy favoring binding arbitration and, thus, destroys the most pervasive form of insurance arbitration clause.

There is a "substantial federal concern for the enforcement of arbitration agreements." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728-29 (1996) (citation omitted). The federal policy's object is to achieve a final disposition of the parties' differences by trading the procedures of the courtroom for the simplicity, informality, and expedition of arbitration, which is a less expensive and faster means of dispute resolution. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (citing H.R. REP. No. 97-542, at 13 (1982)). By taking an issue away from arbitrators and giving it to the courts, the Eighth Circuit has made arbitration harder, less expeditious, and more expensive. While this Court

has been restricting the role of the courts in arbitration cases, the Eighth Circuit and the Third Circuit are expanding it.

The federal courts are unaccustomed to not exercising their authority. Left unchecked, they return to character. The decisions of the Eighth and Third Circuits evidence this weakness. Other courts will follow their example because they cannot help themselves. That is without supervision.

Every day, arbitrators resolve conflicts and tension between contractual terms. They apply their particular field's expertise and experience in doing so. The Eighth Circuit's decision threatens to open the door to courts cherry-picking discrete issues among parties and to limit the ability of arbitrators to resolve them. By denigrating the authority of arbitrators, the Eighth Circuit's decision can only promote the role of the courts in deciding to confirm or vacate arbitration awards on the basis of the court's view of the merits of the disputes. That is not a result intended by the FAA or this Court's arbitration precedent. A reviewing court must affirm an arbitration award even if the court is convinced the arbitrators have "committed serious error." *United Paperworkers Intern'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987). Therefore, certiorari should issue.

2. The language of the Safety arbitration clause appears in many national and international contract disputes.

The cases before the Eighth Circuit will not be the last to present issues concerning the scope of arbitrator authority. The type of arbitration clause in Safety's policies will be before the courts in the future. The Eighth Circuit has twice addressed the language in Safety's policies, in this case and in *Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp.*, No. 03-1092, 2003 WL 22391526 (8th Cir. Oct. 21, 2003).

Safety's arbitration provision in the policies issued to Dow Corning and to Shook & Fletcher is a typical, broad-form arbitration clause. Indeed, as the clause provides for the arbitration of "any dispute arising out of this Policy" (Pet. App. 4a-5a), it is the "paradigm" of a broad-form clause. *See Oldroyd v. Elmira Savings Bank, FSB*, 134 F.3d 72, 76 (2d Cir. 1998); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967); *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 48 n.9 (2d Cir. 1993). The clause conforms to the American Arbitration Association's recommended broad-form arbitration clause for commercial disputes. AMERICAN ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES 2 (July 1, 2003) ("any controversy or claim arising out of or relating to this contract"); 14 ERIC MILLS HOLMES, ET AL., HOLMES' APPLEMAN ON INSURANCE 2D, § 107.2 at 546 (LEXIS 1999). As observed by the Eighth Circuit, the clause is also a typical provision in reinsurance treaties. Pet. App. 6a.

The clause's "condition precedent" language is no less pervasive. The Eighth Circuit concluded, contrary to the arbitrators' decision, that the "condition precedent" language in Safety's clause means the parties bargained for non-binding arbitration. This language is very common in the insurance and reinsurance arenas. Reinsurance is a predominantly international industry.

The "condition precedent" language appears in numerous reported cases. *See McKee v. Home Buyers Warranty Corp. II*, 45 F.2d 981, 985-86 (5th Cir. 1995) (home warranty); *Rainwater v. National Home Ins. Co.*, 944 F.2d 190, 194 (4th Cir. 1991) (home warranty); *Ringwelski v. Pederson*, 919 P.2d 957, 959 (Colo. Ct. App. 1996) (construction contract); *Kelleher v. Cersosimo*, 320 N.E.2d 840, 841 (Mass. Ct. App. 1974) (construction contract); and *Eisel v. Howell*, 155 A.2d 509, 512 (Md. 1959) (construction contract). This is so because the language traces its lineage back to "at least the early 1800's, when arbitration clauses were commonly used in English marine reinsurance contracts." 14 ERIC MILLS HOLMES, ET AL., HOLMES' APPLEMAN ON INSURANCE 2D, § 107.2 at 544 (LEXIS 1999).

At the time, the common law was hostile to arbitration. Using arbitration as a "condition precedent" would not oust the court of jurisdiction and thus would allow an arbitration to go forward; subsequent litigation would not address the merits of the dispute but would serve to transform the arbitration award into a judgment and provide for collection. "In a leading English case, this devise was successful." 15 JOHN E. MURRAY, JR., CORBIN ON CONTRACTS, § 1435 at 353 n.94 (Matthew Bender 2001), *citing Scott v. Avery*, 5 H L. Cas. 811 (1856). Thus, where an insurance policy, by its terms, "makes arbitration a condition precedent to any

right of action, a suit can only be maintained to recover the amount of the award, or if it is invalid, the insured must allege and prove another arbitration, or some sufficient reason why it has become unnecessary or impossible." 6 JOHN ALAN APPLEMAN, ET AL., INSURANCE LAW AND PRACTICE, § 3922 at 520 (West 1972) (citation omitted).

To this day, insurance treatises define an arbitration clause as "[a] provision found in many reinsurance contracts whereby the parties agree to submit their disputes to an unofficial tribunal of their own choosing rather than a court of law, . . . , which produces an opinion *ultimately enforceable by a court of law.*" 14 ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE 2D, § 102.6 at 57 (LEXIS 1999) (emphasis added). As shown above, there is an expectation, consistent with the federal policy, that arbitration brings a final and binding resolution to a dispute.

This case presents a perfect example of how important the finality of arbitration is. Dow Corning is one of many corporations that has found itself at the center of a mass tort. Mass tort litigation is a major factor in today's economy. The defendants in mass tort cases turn to their insurers. Their insurers then turn to their reinsurers, which may be United States or, more often, international companies. "The arbitrability of disputes may be particularly important for the reinsurance industry because of its international scope." 14 ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE 2D, § 107.2 at 545 (LEXIS 1999); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (policy for arbitration applies with special force in international commerce). Most of those reinsurance agreements have arbitration clauses, and many provide that arbitration is a "condition precedent" to

litigation. Because of the Eighth Circuit's decision, parties must now question whether they can count on an efficient, expeditious dispute resolution procedure.

The Eighth Circuit's decision conflicts with the FAA's goal of overcoming judicial hostility to arbitration and undermines the liberal federal policy favoring binding arbitration. *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989). As the opinion will have far-reaching effects, certiorari should issue.

III. The Eighth Circuit Has Created A Standard Of Review That Clashes With The Court's Dictates And Is At Cross-Purposes With The Federal Policy, Which Requires Any Doubts Concerning The Scope Of Arbitrable Issues To Be Resolved In Favor Of Arbitration.

The Eighth Circuit's decision subjected the parties' agreement to arbitrate to the same judicial hostility that the FAA was designed to combat when it was enacted more than seventy-five years ago.

The district court found that "the parties agreed to binding arbitration on the issue of whether the policies provided coverage for the breast implant litigation" and thus the issue whether the panel exceeded its powers in so deciding was "moot." Pet. App. 45a-46a. The district's court's finding of fact was supported by a 1999 bankruptcy court consent order entered in Dow Corning's Chapter 11 bankruptcy. *Id.* In the consent order, which was made while this arbitration was in process, Dow Corning and Safety agreed that their arbitration would be final and binding. *Id.* 91a-95a. The order provided that Safety's alleged liability under the policies

"*will be fully and finally adjudicated*" in the parties' arbitration. *Id.* 92a (emphasis added).

However, in finding the parties intended non-binding arbitration, the Eighth Circuit ignored the governing standard of review and substituted its view of the facts for the district court's on the issue of the parties' intent. A reviewing court reviews a district court's judgment on a motion to vacate, modify, or confirm an arbitration award under familiar standards, accepting findings of fact that are not "clearly erroneous" and deciding questions of law *de novo*. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-48 (1995). This standard of review does not leave the reviewing court "'free to correct the arbitration award' . . . ; rather, it is intended to reinforce the strong deference due an arbitrative tribunal." *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820 (5th Cir. 1993) (citation omitted).

The Eighth Circuit's foray into fact-finding on the parties' intent runs afoul of the federal policy favoring arbitration. "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is *the construction of the contract language itself* or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (emphasis added). This is so even where the scope of an arbitration clause is ambiguous. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995).

A reviewing court must affirm an arbitration award so long as the arbitrators are even arguably construing or applying the contract and acting within the scope of their authority. *United Paperworkers Intern'l Union, AFL-CIO v.*

Misco, Inc., 484 U.S. 29, 38 (1987). A reviewing court must affirm even if the court is convinced the arbitrators have "committed serious error." *Id.* Thus, where the arbitration clause is broadly written, all doubts should be resolved in favor of arbitration, "'unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute.'" *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 650 (1986) (citations omitted).

The Eighth Circuit's decision violates these standards by reversing the arbitrators' declaration and supplanting the district court's finding that the award is binding with its own. The arbitration clause in Safety's policies is certainly susceptible to the conclusion that the parties contemplated binding arbitration. As a matter of contract interpretation and procedure affecting the dispute's "final disposition," it was an issue reserved for the arbitrators' exclusive determination. *Green Tree Fin. Corp. v. Bazzle*, __ U.S. __, 123 S. Ct. 2402, 2407 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

Moreover, consistent with the district court's findings of fact, the phrase "finally adjudicated" in the consent order can have only one meaning in the arbitration context. The phrase connotes *binding* arbitration. Even in the Third Circuit, one of the few courts refusing to support the federal policy favoring binding arbitration, the word "final" in an arbitration agreement means *binding* arbitration. *Orlando v. Interstate Container Corp.*, 100 F.3d 296, 301 (3d Cir. 1996).

Instead of deferring to the arbitrators' decision and the district court's findings, the Eighth Circuit engaged in its own fact finding based on gross speculation. The Eighth

Circuit concluded Dow Corning, as an insured, would not have agreed to binding arbitration. Pet. App. 6a. However, there is nothing in the record supporting the Eighth Circuit's finding on what a policyholder would or would not have agreed to.

The Eighth Circuit's concern for policyholders in this case is misplaced. Dow Corning is among the world's most sophisticated corporations. The $9.15 million in coverage provided by Safety's policies made up only a very small part of the over $1 billion in coverage obtained by Dow Corning for its product liability exposure. Appellee's Brief at 5, *Dow Corning Corp. v. Safety Nat'l. Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003). Dow Corning was not a naive policyholder with no negotiating leverage. It knew what it was doing when it agreed to the arbitration clause at issue.

The Eighth Circuit compounded its disregard for the federal policy by placing the burden of proof on Safety to prove the arbitration provision was binding. The Eighth Circuit found "neither party submitted any . . . evidence" of custom and usage to show whether the arbitration was intended to be binding. Pet. App. 6a. Nevertheless, the Eighth Circuit ruled against Safety because Safety "presented no extrinsic evidence that binding arbitration was intended." *Id.*

The Eighth Circuit ignored that Dow Corning was the movant under 9 U.S.C. § 10. Therefore, Dow Corning had the burden of proving that the arbitrators' award should be vacated, not Safety. *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993). Thus, if the Eighth Circuit believed there was a gap in the evidentiary record on the parties' intent, it should have held that Dow Corning failed to sustain its burden of proof, and affirmed the district court's denial of Dow Corning's motion to vacate.

The Eighth Circuit's decision demonstrates why the Court should declare once and for all that the presumption under the FAA is for binding arbitration. By ignoring the standard of review and the federal policy, by disregarding the consent order which provided for a final adjudication of the parties' dispute by arbitration, and by subjecting Safety to the burden of proof on whether the parties' agreement provided for binding arbitration, the Eighth Circuit has turned the federal policy upside down.

The presumption for arbitration extends to all attendant procedural issues, including those which affect the "final disposition" of the case. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964). Consistent with the arbitrators' decision and the district court's order, the presumption supports the conclusion that binding arbitration was intended. Contrary to the Eighth Circuit's opinion, if the federal presumption were to be rebutted and the decisions of the arbitrators and the district court were to be overturned, the burden of proof rested with Dow Corning, and not Safety. As made plain by the Eighth Circuit's opinion, Dow Corning offered no evidence supporting its position. Pet. App. 6a.

Finally, there was evidence of insurance custom and usage favoring binding arbitration in the record. The evidence of insurance custom and usage was self-proving. In deciding the case, the arbitrators were bound to make their "decision with regard to the custom and usage of the insurance and reinsurance business." Pet. App. 5a. By unanimously finding the arbitration binding, the three arbitrators necessarily followed insurance custom and usage, of which they were experts. The board's members were "active or retired, disinterested officials of insurance or reinsurance companies." Pet. App. 5a. Indeed, the

agreement's incorporation of insurance industry custom and usage to govern the arbitration is indistinguishable from those arbitration agreements that incorporate the rules of the American Arbitration Association, and should be no less dispositive on the binding nature of the arbitration. *Cf. Rainwater v. National Home Ins. Co.*, 944 F.2d 190, 192-93 (4th Cir. 1991) (incorporating American Arbitration Association's rules for entry of judgment on an arbitration award makes the arbitration binding).

The Eighth Circuit should not have substituted its view of the facts for those of the arbitration panel and the district court. The Eighth Circuit addressed the question of the parties' intent *de novo* rather than giving deference to the panel and considering whether the district court's factual findings were clearly erroneous, as required by the Court's decision in *First Options*. The Eighth Circuit's departure from the standard of review and the federal policy favoring binding arbitration "so far depart[s] from the usual course of judicial proceedings" and from settled law that it calls for correction through this Court's power to supervise the actions of the lower federal courts. S. Ct. R. 10(a). Therefore, a writ of certiorari is warranted to review the Eighth Circuit's decision.

CONCLUSION

A writ of certiorari should be granted as the Eighth Circuit's opinion will be precedent which will be seized by all "losers" to disrupt the final and binding resolution of disputes by arbitration, including those between insurers, their insureds, and other insurance companies.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JULY 9, 2003

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 02-2048

In re Arbitration Between Dow Corning Corporation,

Petitioner - Appellant,

v.

Safety National Casualty Corporation,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: January. 13, 2003

Filed: July 9, 2003

Before LOKEN,* FAGG, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

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* The Honorable James B. Loken became Chief Judge of the United States Court of Appeals for the Eighth Circuit on April 1, 2003.

Appendix A

LOKEN, Chief Judge.

Safety National Casualty Corporation (Safety) issued three "excess umbrella" liability insurance policies to Dow Corning Corporation (Dow Corning) covering the period December 1, 1983 to December 1, 1984. The policies included a mandatory arbitration provision. Many years later, Safety denied coverage for claims by consumers that silicon breast implants manufactured by Dow Corning caused them to suffer autoimmune disease. In June 1998, Dow Corning commenced arbitration of the coverage dispute. The critical issue was when coverage arose under the policies for autoimmune disease injuries.

Dow Corning and Safety could not amicably select the three-member panel of arbitrators required by the arbitration clause in the policies. Safety moved to compel arbitration under section 4 of the Federal Arbitration Act (FAA), 9 U.S.C. § 4, seeking to resolve Dow Corning's objection to Safety's party-arbitrator. Dow Corning responded with a cross-motion under section 5 of the FAA, asking the district court to appoint the neutral member of the three- member panel. The district court denied both motions. We affirmed, remanding with directions that the parties "select an umpire and get on with the arbitration of their coverage dispute." *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 205 F.3d 1345 (8th Cir. 2000) (table).

After a hearing in July 2001, the panel issued a 2:1 decision in favor of Safety on the coverage issue, declaring its decision to be binding on the parties. Dow Corning filed a motion to vacate the award under section 10 of the FAA,

9 U.S.C. § 10. The district court denied the motion. Dow Corning appeals, arguing that the award should be vacated under section 10(a)(4) because the arbitrators exceeded their authority when they declared their decision binding and allowed the pre-hearing appointment of a substitute arbitrator; and that the award should be vacated under section § 10(a)(2) because of the neutral umpire's evident partiality. We modify the district court's judgment to reflect our conclusion that the arbitrators' award is non-binding and otherwise affirm.

I. The Binding Arbitration Issue

Arbitration usually results in a final determination that is binding on the parties to the underlying dispute, but the parties may instead agree to non- binding arbitration, in which case the arbitrators' decision is likely to be a precursor to further litigation on the merits of the dispute. The distinction is significant. "Mandatory arbitration prior to resort to a court is a different concept from mandatory arbitration precluding resort to a court." *Orlando v. Interstate Container Corp.*, 100 F.3d 296, 300 (3rd Cir. 1996) (concluding that a collective bargaining agreement called for mandatory but not binding arbitration).

If contracting parties agree to binding arbitration, if their agreement is within the reach of the FAA, and if they "have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration," then a federal court asked to confirm the award "must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11." 9 U.S.C. § 9. But in this case, Safety

did not ask the district court to confirm the award under section 9, so we need not decide whether the arbitration agreement contained the judgment-entering recitation required by section 9. *See PVI, Inc. v. Ratiopharm GmbH*, 135 F.3d 1252 (8th Cir. 1998). However, Safety did ask the arbitrators to declare their decision binding, and they did so over Dow Corning's objection. Dow Corning moved to vacate the award under section 10(a)(4), arguing the panel exceeded its authority in purporting to render a binding decision. The district court agreed that the decision was binding, and Dow Corning appeals that ruling.

1. As this is a question of the contracting parties' intent, we begin with the terms of the arbitration clause in the insurance policies. Parties intending binding arbitration should say so explicitly in the agreement to arbitrate, either by providing that the arbitration award will be "final and binding," or words to that effect, or by incorporating by reference the rules of the American Arbitration Association or a similar arbitral body that expressly provide for binding arbitration. *See, e.g., Rainwater v. Nat'l Home Ins. Co.*, 944 F.2d 190, 192-94 (4th Cir. 1991) (incorporating AAA rules providing for entry of judgment upon the arbitration award makes the arbitration binding); *Daniel Constr. Co. v. Int'l Union of Operating Eng'rs, Local 513*, 738 F.2d 296, 298-300 (8th Cir. 1984) (collective bargaining agreement provided for "final and binding" arbitration). However, the agreement to arbitrate in the Safety insurance policies contained no such provision. It merely provided:

> As a condition precedent to any right of action under this Policy, any dispute arising out of this

Appendix A

> Policy shall be submitted to the decision of a board of arbitration. . . . The members of the board of arbitration shall be active or retired, disinterested officials of insurance or reinsurance companies. . . . The board shall make its decision with regard to the custom and usage of the insurance and reinsurance business.

Dow Corning argues that the "condition precedent" clause confirms the parties intended non-binding arbitration. Though the clause suggests that arbitration of a policy dispute will be followed by litigation, and thus is non-binding, like the district court we do not find this textual clue conclusive. It can also be read as simply recognizing that even binding arbitration is often followed by litigation, as the Fourth Circuit construed a similar provision in *Rainwater*, 944 F.2d at 194:

> [The court] read[s] "condition precedent" to some extent as an artifact left over from the days of hostility toward arbitration. To the extent that the phrase has meaning, we find that it does not undermine the binding nature of arbitration, but instead applies to the confirmation process permitted by [the FAA] or to other litigation in which the arbitration award would be final but just a sub-text in some larger litigation context.

With the arbitration clause ambiguously silent on this issue, we must determine whether the parties to these 1983 excess liability insurance policies intended to contract for binding arbitration. Though evidence of custom and usage

among parties to this type of insurance would be relevant, neither party submitted any such evidence. Looking more closely at the text of the agreement, we note the policies require that *all three* arbitrators be "active or retired, disinterested officials of insurance or reinsurance companies" and that their decisions be made "with regard to the custom and usage of the insurance and reinsurance business." This sounds very much like a provision designed for the resolution of technical disputes between an insurance company and its reinsurer. Here, on the other hand, the provision was inserted into an excess liability policy, where it applies to coverage disputes between an insurer and its insured and provides a decidedly pro-insurer "tilt" to the proceedings. An insured (other than another insurance company) is unlikely to agree that the results of such a proceeding will be binding, that is, judicially unreviewable on the merits under the FAA.

Though federal policy favors arbitration, and that normally means binding arbitration, we know of no federal policy favoring *binding* arbitration of insurance coverage disputes. Safety -- which drafted the policies and presumably had greater knowledge of the custom and practices of excess liability insurers and reinsurers -- presented no extrinsic evidence that binding arbitration was intended and cited no federal case in which an arbitration agreement *entirely silent on this question* was construed as providing for binding arbitration. On this record, we conclude the excess liability policies provided for mandatory but non-binding arbitration.

2. The district court acknowledged that the "condition precedent" language in the policies, though ambiguous, suggests that non-binding arbitration was initially intended.

But the court concluded that Dow Corning subsequently agreed to binding arbitration of this coverage dispute, first in a 1994 settlement agreement dismissing Safety from a pending multi-insurer coverage suit, and then again in a July 1999 consent order entered in Dow Corning's Chapter 11 bankruptcy proceeding. In the settlement agreement, Dow Corning and Safety agreed "to arbitrate all coverage issues under [the policies]" if negotiations failed to resolve the dispute. The bankruptcy consent order, entered with the arbitration in process, provided that Safety's liability under the policies:

> will be fully and finally adjudicated (i) in the existing arbitration action . . . and/or (ii) in subsequent actions in the appropriate forum addressing matters of such insurance coverage and liability not resolved in such Arbitration and/or addressing enforcement thereof ....

We cannot agree that the settlement agreement was "an agreement to engage in binding arbitration." It was an agreement to arbitrate under the policies if the dispute could not be informally resolved. This added nothing to the initial agreement to engage in mandatory, non-binding arbitration. The peculiar terms of the consent order present a closer question. It provided that the coverage dispute will be "finally adjudicated" through the pending arbitration "and/or" subsequent litigation. This language imperfectly describes a process beginning with mandatory arbitration. The process as described could be either binding or non-binding from the standpoint of its enforceability under the FAA. As Dow Corning has consistently argued that the policies called for

non-binding arbitration, we conclude that the consent order, like the settlement agreement, preserved the parties' conflicting positions on this issue.

3. We must next determine the impact of our conclusion that the parties contracted for non-binding arbitration. The arbitrators doubtless exceeded their authority in declaring their decision to be binding, because that issue goes to the scope of their authority. *See generally First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). In any event, we have concluded their award was non-binding as a matter of law. This error is grounds for modifying the award by deleting the offending declaration. *See* 9 U.S.C. § 11(b). It would also require reversing the confirmation of an award under 9 U.S.C. § 9, because an award must be binding to be confirmed under section 9's highly deferential standard of review. But our conclusion that the award is non-binding does not warrant vacating the entire award. *See Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1196 (11th Cir. 1995) (vacating part of an award that exceeded the arbitrators' authority but confirming remainder of the award).

4. There remains a threshold question not addressed by the parties -- whether our conclusion that the arbitration was non-binding deprives us of jurisdiction to address Dow Corning's additional grounds for vacating the entire award under FAA § 10. This issue of the FAA's reach has arisen in the context of agreements to arbitrate that attempt to prescribe a standard of judicial review that is less deferential to the arbitrators than that prescribed in FAA § 10. One circuit has held that a provision calling for expanded review of the merits of an arbitration award is unenforceable under the

FAA. *See Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 937 (10th Cir. 2001). At least one commentator has gone further and suggested that such provisions result in agreements that are not sufficiently "final" to be governed by the FAA. *See generally* Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123 (2002). This case presents the issue in a different context. Dow Corning did not ask the district court to review the merits of the arbitrators' award, nor did Safety move to confirm the award under section 9. Thus, the only question is whether the FAA authorizes section 10 review of a mandatory but non-binding award. We conclude that it does.

Binding arbitration is no doubt the norm under the FAA, but no express language limits the statute to binding arbitration agreements. Other circuits have held that the FAA applies to at least some agreements to engage in mandatory, non-binding arbitration. *See United States v. Bankers Ins. Co.*, 245 F.3d 315, 322 (4th Cir. 2001); *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1207-09 (9th Cir. 1998); *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 349-50 (3d Cir. 1997). We signaled a similar view of the statute in *UHC Mgmt. Co. v. Computer Sciences Corp.*, 148 F.3d 992, 997 (8th Cir. 1998), when we commented that this court "will not interpret an arbitration agreement as precluding the application of the FAA unless the parties' intent that the agreement be so construed is abundantly clear."

At different times, both parties asked the district court for relief under sections 4, 5, and 10 of the FAA. While the present appeal will not finally resolve their coverage dispute, addressing the additional section 10 issues raised by Dow

Corning will significantly advance the dispute resolution process. The policies provide that non-binding arbitration is a "condition precedent" to subsequent litigation. Dow Corning argues that the now-completed arbitration was fundamentally defective and therefore a nullity. If Dow Corning is correct, the entire award will be vacated, presumably requiring the parties to again arbitrate the dispute before commencing litigation. If Dow Corning's section 10 arguments are rejected, the parties are free to commence coverage litigation in which the non-binding award will presumably be given such persuasive weight as the court concludes it deserves. For these reasons, we conclude we have jurisdiction to decide the additional section 10 issues.

II. The Substitute Arbitrator Issue

Dow Corning argues that the arbitration award must be vacated under 9 U.S.C. § 10(a)(4) because the panel exceeded its authority when Safety's party-arbitrator resigned and the two remaining panel members directed Safety to appoint a substitute party-arbitrator. Review of this issue requires further factual background.

The policies provided for a panel of "two arbitrators and an umpire" and described the selection process in detail:

> Each party shall appoint its arbitrator, and the two arbitrators shall choose an umpire before instituting the hearing. . . . If the two arbitrators fail to agree upon the appointment of an umpire within four weeks after their nominations, each of them shall name three, of whom the other shall

> decline two and the decision shall be made by drawing lots.

After initiating the arbitration, Dow Corning appointed Benjamin Schenk as its party-arbitrator. Safety appointed Jack Nelson as its party-arbitrator. Schenk nominated three umpire candidates, while Dow Corning informally challenged Nelson's qualifications to serve. When Safety would not proceed with Nelson's status unresolved, Dow Corning filed its FAA § 5 motion, urging the district court to choose an umpire from Schenk's list because Nelson had not timely nominated three umpires. The district court denied this motion and we affirmed, instructing the parties "to select an umpire and get on with the arbitration." Nelson then nominated three umpire candidates. Each party- arbitrator struck two of the other's nominees, and James Lyon, Nelson's third nominee, was selected as umpire by an agreed process akin to a coin flip or to "drawing lots."

One week later, Nelson resigned as Safety's party-arbitrator because his current employer was involved in the management of Dow Corning's pension assets. Dow Corning advised umpire Lyon and party-arbitrator Schenk that Nelson's withdrawal terminated their authority to hear the dispute. Lyon and Schenk instead ruled that Safety should appoint a substitute party-arbitrator. Safety named John Hyland as substitute party-arbitrator. Instead of filing a second FAA § 5 motion challenging this ruling, Dow Corning agreed to proceed with a "reservation of right" to challenge the panel's authority. We view this as a transparent attempt to preserve a threshold procedural issue in case Dow Corning eventually lost the arbitration on the merits.

On appeal, Dow Corning invokes "the general rule that where one member of a three-person arbitration panel dies before the rendering of an award and the arbitration agreement does not anticipate that circumstance, the arbitration must commence anew with a full panel." *Trade & Transport, Inc. v. Natural Petroleum Charterers Inc.*, 931 F.2d 191, 194 (2nd Cir. 1991), followed in *Marine Prods. Export Corp. v. M.T. Globe Galaxy*, 977 F.2d 66 (2nd Cir. 1992). But as the district court recognized, the circumstances in this case distinguished it from those applying the so-called general rule and justified the panel's decision to proceed after Safety selected a substitute party-arbitrator. First, because the substitution occurred before the substantive arbitration hearing, the substitute party-arbitrator participated fully in the hearing, the panel's deliberations, and the preparation of the panel's decision. *Compare In re Cia de Navegacion Omsil, S.A.*, 359 F. Supp. 898, 899 (S.D.N.Y. 1973). Second, the remaining arbitrators made a reasonable decision to allow Safety to choose its substitute party-arbitrator, the method of selecting party-arbitrators prescribed in the agreement to arbitrate. Third, as Dow Corning well knew, starting over would have deprived Safety of its "win" in the umpire selection process. The Second Circuit recognized in *Marine Products*, 977 F.2d at 68, that the general rule does not apply when a vacancy arises after the original panel has "rendered a final decision on any question."

Finally, and most importantly, Dow Corning acknowledges that a vacancy in an arbitration panel may be filled in the manner prescribed in the agreement to arbitrate. Here, the remaining arbitrators concluded that the agreement authorized them to proceed with a substitute party-arbitrator. In general, reviewing courts leave procedural issues for the arbitrators to decide.

See El Dorado School Dist. # 15 v. Continental Cas. Co., 247 F.3d 843, 846-47 (8th Cir. 2001). Dow Corning argues the panel's ruling is not entitled to deference because the question concerned their authority. But even if that is true, the district court was expressly authorized by FAA § 5 to construe the arbitration agreement in this regard and to resolve the vacancy issue in the event the agreement did provide a method for doing so. Yet Dow Corning failed to file a section 5 motion challenging the panel's ruling on the substitution issue. In these circumstances, the district court correctly declined to vacate the award on this ground. *See Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 674 (5th Cir. 2002).

III. Umpire Lyon's Alleged Evident Partiality

Dow Corning next argues that we should vacate the arbitration award under section 10(a)(2) because umpire Lyon's conduct before and during the hearing demonstrated his evident partiality in three respects. We reject these contentions.

A. Nondisclosure of Another Umpire Nomination. Almost a year after Safety's party-arbitrator nominated Lyon to serve as umpire in this case, Safety nominated Lyon as a potential referee in another breast implant case involving Bristol-Meyers Squibb Company. Lyon was not chosen to serve in the Bristol-Meyers arbitration. Dow Corning nonetheless argues that his failure to promptly disclose the nomination in this proceeding demonstrates evident partiality within the meaning of section 10(a)(2). The district court rejected this contention, concluding that (i) Lyon and Safety did not have the type of ongoing relationship that required

disclosure; (ii) the subsequent nomination did not create a conflict or bias, particularly because Lyon was not chosen to serve; (iii) Dow Corning and Safety had agreed to an umpire selection process permitting each to nominate umpire candidates "whose credentials suggest that they would be inclined to favor the nominating party"; and (iv) Lyon's insignificant relationship with Safety "has not established an appearance of, or actual bias."

We agree with the district court's reasoning. At the outset of the arbitration process, arbitrators must disclose "a substantial interest in a firm which has done more than trivial business with a party." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 151-52 (1968) (White, J., concurring); *see Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157, 159 (8th Cir. 1995). Here, when Lyon was nominated, Dow Corning was aware that Safety had nominated him to serve in two prior arbitrations, and that he had served in one. The Bristol-Myers nomination came well after Lyon was chosen as umpire in this case, and he was not chosen to serve in the Bristol-Myers case. Thus, the non-disclosure does not "*objectively* demonstrate such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives." *ANR Coal Co. v. Cogentrix of N. C., Inc.*, 173 F.3d 493, 501 (4th Cir.), *cert. denied*, 528 U.S. 877 (1999).

Moreover, in this case we doubt that being nominated for other arbitrations is "more than trivial business" within the meaning of *Commonwealth Coatings*. When the parties agree to arbitration before disinterested persons who have experience in a specialized business or type of problem, the

relatively small number of qualified arbitrators may make it common, if not inevitable, that parties will nominate the same arbitrators repeatedly. *See Int'l Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 551-52 (2nd Cir.), *cert. denied*, 451 U.S. 1017 (1981) (maritime arbitration); *Transit Cas. Co. v. Trenwick Reins. Co.*, 659 F. Supp. 1346, 1353-54 (S.D.N.Y. 1987) (insurance arbitration). "The parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen." *Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.3d 815, 821 (8th Cir. 2001), *cert. denied*, 123 S. Ct. 87 (2002) (quotation omitted). We conclude that Lyon's failure to disclose the Bristol-Meyers nomination does not demonstrate evident partiality within the meaning of section 10(a)(2).

B. Ex Parte Contacts. After the panel held an organizational meeting, it issued a written summary prohibiting further ex-parte communications between the party-arbitrators and their respective parties but providing that umpire Lyon "may discuss administrative matters with an individual arbitrator or counsel when to do otherwise would be difficult or overly time consuming." Some months later, Lyon needed to confer with counsel regarding the scheduling of the arbitration hearing. Because Safety's counsel was in trial, Lyon deemed it impracticable to arrange a telephone conference call and instead talked to each party's counsel individually. Lyon first contacted Safety's counsel. In addition to discussing scheduling issues, Lyon told counsel that it would expedite the hearing if the parties limited expert testimony to witnesses having direct experience and education. Lyon then called Dow Corning's counsel and again

expressed his view that expert testimony should be limited to witnesses with proper educational background and experience.

Dow Corning then wrote a letter to Lyon stating its belief that his telephone conversations with counsel individually were improper ex parte contacts and warranted his resignation. Counsel for Dow Corning and Safety exchanged letters with each other and the panel on this issue. Lyon wrote counsel and the other panel members explaining that the telephone conversations were simply administrative in nature. Dow Corning alleged that Lyon said he was not interested in testimony relating to the trigger-of-coverage issue by an expert lacking "clinical or medical experience," a position that showed bias in favor of Safety. After further argument from Dow Corning and Safety, the panel ruled that no member would resign and the arbitration would continue. Schenk, Dow Corning's party-arbitrator, wrote separately, explaining that the "nature of these conversations does not trouble me, as neither party (nor the other arbitrators) was prejudiced by non-participation."

In the district court, Dow Corning primarily argued that umpire Lyon's ex parte contacts were misconduct requiring that the award be vacated under section 10(a)(3). In support, Dow Corning offered affidavit evidence from a former judge and noted arbitration expert opining that the ex parte contacts were prejudicial and violated both the prevailing ethical rules and the panel's own prohibition. The district court rejected this contention on the merits, correctly noting that Dow Corning was not prejudiced by the ex parte contacts because the panel did not later exclude the extensive expert evidence

offered by Dow Corning at the hearing, and that a departure from the prevailing ethical norms for arbitrators is not grounds for vacating an award under FAA § 10. *See Delta Mine*, 280 F.3d at 820. The district court struck portions of the arbitration expert's affidavit on the ground that it expressed opinions on questions of law that were for the court to decide.

Dow Corning recasts this issue on appeal, arguing the ex parte communications demonstrated Lyon's evident partiality, contrary to section 10(a)(2), because Lyon contacted Safety's counsel first and his position regarding the relevance of expert testimony favored Safety's position on the critical trigger-of-coverage issue. In our view, this contention is without merit because the ex parte contacts, even if arguably improper, simply do not demonstrate evident partiality. Umpire Lyon had an "administrative" reason for contacting counsel (to discuss scheduling) and a basis for deciding that he needed to contact them one at a time. Thus, his phone calls to counsel were ex parte communications authorized at the panel's organizational meeting. Lyon can be criticized for going beyond scheduling issues and discussing the scope of expert testimony. But the district court found that he did not solicit ex parte argument from either attorney, a finding that is not clearly erroneous, and the court concluded that the conversations "reflect his role as umpire and the attendant duty to assure that the arbitration proceeded in an efficient manner," a conclusion consistent with our decision in *PaineWebber Group, Inc. v. Zinsmeyer Trusts P'ship*, 187 F.3d 988, 995 (8th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000).

On appeal, Dow Corning vehemently challenges the district court's decision to strike portions of the arbitration expert's affidavit. But that ruling provides no basis to reverse the court's denial of Dow Corning's motion to vacate. The court acknowledged the expert's indisputably distinguished career and expertise but concluded that it would not consider legal opinions that "attempt to tell the court what result to reach." That decision was not an abuse of the court's substantial discretion under Rule 702 of the Federal Rules of Evidence. *See United States v. Whitted*, 11 F.3d 782, 785 (8th Cir. 1993). In addition, giving the expert's opinions and conclusions full consideration would not change our view that umpire Lyon's ex parte contacts did not demonstrate evident partiality within the meaning of section 10(a)(2). Thus, striking portions of the affidavit was at most harmless error. *See Williams v. Wal-Mart Stores, Inc.*, 922 F.2d 1357, 1360 (8th Cir. 1990).

C. Limiting Dow Corning's Cross-Examination. Dow Corning argues that Lyon exhibited evident partiality when he limited cross-examination of Safety's trigger-of-coverage expert witness, thereby concealing the weaknesses of Safety's position from the other panel members. This contention is without merit. Arbitrators have broad discretion to limit the cross-examination of witnesses at arbitration hearings. *See Delta Mine*, 280 F.3d at 823 & n.6; *Hoteles Condado Beach, La Concha & Convention Center v. Union De Tronquistas Local 901*, 763 F.2d 34, 38-39 (1st Cir. 1985). Umpire Lyon was well within his discretion in limiting Dow Corning's cross-examination of Safety's expert while giving Dow Corning wide latitude to present its affirmative case. Dow Corning has totally failed to establish that this

procedural ruling demonstrated Lyon's evident partiality within the meaning of section 10(a)(2).

IV. Conclusion

For the foregoing reasons, we direct the district court to modify its judgment so as to declare the arbitrators' decision of August 7 and 8, 2001 non-binding. In all other respects, the judgment denying Dow Corning's motion to vacate the arbitrators' decision is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION DATED MARCH 18, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:98CV1701JCH

IN RE ARBITRATION BETWEEN
DOW CORNING CORPORATION,

Arbitration-Claimant,

vs.

SAFETY NATIONAL CASUALTY CORPORATION,

Arbitration-Respondent.

MEMORANDUM AND ORDER

This matter is before the court pursuant to a Motion to Vacate Arbitration Decision filed by Arbitration-Claimant Dow Corning Corporation ("Dow Corning"). *See* Doc. 40. Also before the court is a Motion to Strike Affidavits filed by Arbitration-Respondent Safety National Casualty Corporation ("Safety"). *See* Doc. 54. Safety filed a Memorandum in Opposition to Dow Corning's Motion to Vacate Arbitration Decision. *See* Doc. 56. Dow Corning filed a Reply. *See* Doc. 64. Safety also filed a Motion to File Exhibits Under Seal, in which motion Dow Corning joined,

in part. *See* Doc. 53. For the reasons set forth below, the court denies Dow Corning's Motion to Vacate, and grants Safety's Motion to Strike Affidavits and Motion to File Exhibits Under Seal, in part, and denies them, in part.

BACKGROUND[1]

In 1983, Safety issued three high-level excess liability insurance policies to Dow Corning. *See* Doc. 40, Dow Corning's Memorandum in Support of Motion to Vacate ("Dow Mem."), Ex.'s 6-8; Doc. 56, Safety's Memorandum in Opposition to Motion to Vacate ("Safety Mem."), Ex 9. These policies state that the policy period was from December 1, 1983, to December 1, 1984, for total coverage of $9.15 million. *See id.* The parties included an identical arbitration provision in paragraph eleven of each of these policies. The arbitration provision provides, in relevant part:

> [A]ny dispute arising out of this Policy shall be submitted to a decision of a board of arbitration. The board of arbitration will be composed of two arbitrators and an umpire .... The members of the board of arbitration shall be active or retired, disinterested officials of insurance or reinsurance companies. Each party shall appoint an arbitrator, and the two arbitrators shall choose an umpire before instituting the hearing. If the respondent fails to appoint its arbitrator within four weeks after being requested to do so by the claimant, the latter shall also appoint the second arbitrator.

1. The facts, as stated in this Memorandum and Order, are uncontroverted, unless otherwise stated.

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> If the two arbitrators fail to agree upon the appointment of an umpire within four weeks after their nominations, each of them shall name three, of whom the other shall decline two and the decision shall be made by drawing lots.
>
> . . . The board shall make its decision with regard to the custom and usage of the insurance and reinsurance business. The board shall issue its decision in writing based upon a hearing in which evidence may be introduced without following strict rules of evidence but in which cross-examination and rebuttal shall be allowed.

Id.

As a result of the tort litigation over breast implants that emerged in the early 1990's, in 1993, a group of insurance companies fled a declaratory judgment action against Dow Corning and its other insurers in Detroit, Michigan, in June 1993. Dow Corning and Safety reached an agreement, dated December 22, 1994, by which Safety was dismissed from the Michigan coverage litigation.[2] *See* Dow Mem., Ex. 16.

2. The court's final judgment in the Michigan litigation, *Dow Corning v. Granite State Ins. Co.*, No 93-325788CK (Wayne Cty., Mich. Cir. Ct. July 9, 1996), found that Dow Corning Corporation ("Dow Corning") was entitled to coverage for breast implant claims under each policy in effect from the date of a claimant's breast implant until the date of claim. *See* Doc. 40, Dow Corning Memorandum ("Dow Mem."), Ex. 9 at 2. According to Dow Coming, the majority of insurers settled either before or after the trial court's ruling. *See id.* at 3. The Michigan Court of Appeals affirmed the decision of the trial court. *See* Dow Mem., Ex. 10. The Michigan Supreme Court denied the non-settling insurers' application for leave to appeal. *See id.*, Ex. 11.

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The agreement provided that Dow Corning and Safety would proceed under the arbitration provision in the Safety policies, in the event it became necessary to arbitrate following the completion of the Michigan litigation. *See id.*, Ex. 16. This agreement to arbitrate stated, in pertinent part, that:

> Dow Corning and Safety National agree to arbitrate all coverage issues under [the policies]. The arbitration shall occur only after the Michigan litigation between Dow Corning and its insurers is concluded at the trial court level. . . . Within fourteen (14) days of the execution of this agreement, Dow Corning shall move to dismiss Safety National from the Michigan litigation so that the parties can pursue their dispute as contemplated in this agreement. Upon dismissal of the aforesaid litigation, the parties agree to enter good faith negotiations in an effort to resolve their coverage dispute without further arbitration.

Id.

On June 30, 1998, Dow Corning formally initiated arbitration with Safety. *See id.*, Ex. 17. Dow Corning stated that the dispute over which it was seeking arbitration arose "out of Dow Corning's demand for insurance coverage for breast implant claims and Safety's refusal to provide such coverage under contracts of excess liability insurance for the period from December 1, 1983, to December 1, 1984." *Id.* Dow Corning further stated that it was seeking coverage for a total of $9.150 million, and was seeking a decision "as to Safety's liability to Dow Corning, including the appropriate

damages, costs, fees, interest, and declaratory and other relief to which Dow Corning [was] entitled." *See id.* Also, in June 1998, Dow Corning appointed Benjamin Schenk as its party-appointed arbitrator and requested that Safety appoint its arbitrator within four weeks, as required by the arbitration clause in the policies. *See id.*

On July 24, 1998, Safety appointed Jack Nelson as its party-appointed arbitrator. *See id.*, Ex. 19. On August 24,1998, upon the expiration of the four-week period specified in the arbitration clause for party-appointed arbitrators to agree upon an umpire, Mr. Schenk provided Mr. Nelson with a list of three umpire nominees and requested the names of Mr. Nelson's nominees. *See id.*, Ex. 20. On August 25, 1998, Dow Corning informed Safety that it believed that Mr. Nelson did not meet the qualifications of arbitrator, as specified in the arbitration clause, but that it would proceed with the arbitration, subject to reserving its right to challenge Mr. Nelson's qualifications. *See* Doc. at 2.

On October 8, 1998, Safety filed a motion, pursuant to 9 U.S.C. § 4, requesting that the court compel arbitration and declare that Dow Corning could not reserve its right to contest the qualifications of Mr. Nelson. *See* Doc. 1. Dow Corning responded by filing a cross-motion to compel, pursuant to 9 U.S.C. § 5, and requesting that the court appoint one of three potential umpires nominated by its party-appointed arbitrator. *See* Doc. 13. By Memorandum and Order, entered March 23, 1999, the court denied each party's motion. *See* Doc. 25. The Eighth Circuit Court of Appeals affirmed the decision of the district court and remanded the matter to the district court. *See* Doc. 30.

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A Consent Order Resolving Debtor's Omnibus Claim, dated July 15,1999, states, in pertinent part, that:

> Matters and issues with respect to the alleged liability of Safety National to Dow Corning, . . . under any Insurance Policy will be fully and finally adjudicated (i) in the existing arbitration action ("the Arbitration") in accordance with any orders previously entered by the Bankruptcy Court in this case related to the Arbitration, and/or (ii) in subsequent actions in the appropriate forum addressing matters of such insurance coverage and liability not resolved in such Arbitration and/or addressing enforcement thereof (collectively, the "Insurance Litigation").

Dow. Mem., Ex. 58 at ¶ 3.

On January 28, 2000, Safety's party-appointed arbitrator, Mr. Nelson, tendered the names and resumes of three nominees for umpire. *See* Dow Mem., Ex. 23. As stated above, Mr. Schenck, Dow Chemical's party-appointed arbitrator had tendered his list of umpires in August 1998. Because the parties could not agree on a vetting process for the appointment of an umpire, Dow Corning filed a motion in district court, requesting that the court appoint an umpire. *See* Doc. 31. Upon denying this motion, the district court found that "the arbitration clause does not provide for a vetting process," and that "technically the parties are each free to choose the method most suitable to them." Doc. 38 at 4. The court ordered the parties to "choose an umpire by drawing lots as agreed in the arbitration clause." *Id.* at 5.

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Pursuant to the arbitration clause and the order of the district court, Mr. Schenck and Mr. Nelson conducted the exercise of alternate strikes, as provided in the arbitration clause. *See id.*, Doc. 24. After each arbitrator struck two names, the remaining two-person pool included Caleb Fowler, who was Mr. Schenck's choice, and James A. Lyon, who was Mr. Nelson's choice. Rather than draw lots, as provided by the arbitration agreement and the court's order, the parties agreed that the choice of umpire would be determined by the Dow Jones average at the close of business on July 18, 2000; if the last digit was even, Mr. Fowler would serve as umpire and if the last digit was odd, Mr. Lyon would serve as even. *See id.* As the last digit was odd, Mr. Lyon was chosen as the umpire.

On July 25, 2000, Mr. Nelson informed the parties that he was withdrawing as Safety's party-appointed arbitrator.[3] *See* Dow Mem., Ex. 27. On August 4, 2000, Dow Corning informed Umpire Lyon and Mr. Schenck that Mr. Nelson's withdrawal "terminated this Tribunal's authority to hear this dispute." *Id.*, Ex. 28. Dow Corning further requested that Umpire Lyon and Mr. Schenck resign so that the parties could re-commence the selection process. *See id.* However, Umpire Lyon responded that he and Mr. Schenck concluded that "it would be inappropriate to resign, but rather should wait for Safety National to appoint its replacement." *Id.* Dow Corning reiterated its belief that the panel lost all power upon Mr. Nelson's resignation, but it agreed to proceed with the

3. Jack Nelson informed the parties that he could no longer serve on the arbitration panel because his current employer was "involved with the management of pension assets for Dow Corning." Dow Mem., Ex. 27.

newly constituted panel, under a reservation of rights to challenge the arbitration panel's authority to preside over the matter. On August 21, 2000, Safety named John Hyland as its substitute arbitrator. *See id.*, Ex. 31.

The newly constituted arbitration panel held an organizational meeting on October 3, 2000. Umpire Lyon provided the parties and the party-appointed arbitrators with a summary of that meeting. This summary states that counsel for Safety accepted the panel, but that counsel for Dow Corning "agreed to proceed with the panel as constituted under a full reservation of rights." *Id.*, Doc 32. The summary further stated that "the panel decided that there would not be any ex-pane communications between the party appointed arbitrators and their respective parties and counsel subsequent to the organizational meeting." *Id.* The summary did state, however, that "the umpire may discuss administrative matters with an individual arbitrator or counsel when to do otherwise would be difficult or overly time consuming." *Id.*

On November 21, 2000, Safety requested that the arbitration panel make findings that: (1) the arbitration panel was properly constituted; (2) the arbitration panel had the authority to determine whether its award would be binding on the parties; and (3) the arbitration panel's decision would be binding. *See id.*, Ex. 33. Dow Corning submitted its opposition to Safety's request and argued that the arbitration panel had no authority to address the issues raised by Safety. *See id.*, Ex. 34.

By letter, dated January 9, 2001, Dow Corning clarified its position to the arbitration panel, and reiterated that it was

reserving its rights "to dispute the effect of Mr. Nelson's resignation and withdrawal from [the arbitration panel]." *Id.*, Ex. 35 at 2. In its letter of January 9, 2001, Dow Corning further clarified that it was reserving its right to "dispute the binding or non-binding nature of [the] proceeding;" to challenge the fairness of the proceeding in view of the qualifications of the arbitrators; and to challenge the arbitration panel's "rulings based on all grounds set forth in the [FAA] or other applicable statute, or otherwise recognized by the courts." *Id.* at 2-3. By memorandum, dated January 17, 2001, Umpire Lyon advised the parties that the arbitration panel "is of the unanimous opinion that it has been and is properly constituted and that it is the panel's unanimous intent that its decisions, rulings, orders, and awards be deemed as binding upon the parties." *Id.*, Ex. 36.

Dow Corning alleges that on March 26, 2001, Umpire Lyon spoke on the telephone, individually, with Safety's counsel and with Dow Corning's counsel. *See* Dow Mem. at 10. The substance of these conversations is discussed below, in regard to Dow Corning's Ground 2(a), in which Dow Corning contends that "these ex-pane telephone conversations concerned the type of expert testimony that Umpire Lyon wished to hear (and not hear) at the arbitration hearing on the critical 'trigger-of-coverage' issue." *Id.*

After a hearing, held on July 23-27, 2001, the arbitration panel issued its 2-1 decision. *See id.*, Ex. 4. In the decision, the panel found that (1) its decision was binding on both parties. The panel further found that:

> (2) In consideration of the policy wordings and the custom and usage of the insurance and

reinsurance business, the "Trigger of Coverage" is "Injury in Fact" which shall be interpreted as an actual personal injury which:

> (a) First occur[ed] during the December 1, 1983, to December 1, 1984, period of [the policies at issue]. (b) Is causally related to a Dow Corning implant. (c) Is supported by documented medical evidence that such initial injury occurred during this policy period and that a related medical examination and/or treatment occurred during this policy period or reasonably soon thereafter.

(3) Safety National is required to indemnify Dow Corning for Safety National's pro rata share of each individual loss payment and related allocated loss adjustment expense under these three policies only to the extent that an actual claim payment is made to an identifiable third party claimant who sustained an injury in fact during the period of these policies.[4]

Id., Ex. 4 at ¶¶ 2-3.

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4. In his dissent, Dow Corning's party-appointed arbitrator, Benjamin Schenck, stated:

> Paragraph 2(a) is all right because that means that injury happened at date of implant.
>
> Paragraph 2(b) is bizarre. Everybody at this hearing agrees that there is probably no causal connection between an implant and disease. This paragraph effectively denied Dow any coverage for billions it will pay for injuries alleged by claimants.

(Cont'd)

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Dow Corning seeks vacatur of the arbitration decision on the following grounds:

> (1) The arbitration panel exceeded its powers (a) by deciding that its decision would be binding upon the parties and (b) by retaining jurisdiction over the case after the resignation of one of the arbitrators. *See* Dow Mem. at 12-25.
>
> (2) The umpire engaged in misconduct and misbehavior (a) by initiating improper and prejudicial ex-parte communications and (b) by excluding highly material evidence. *See id.* at 27-40.
>
> (3) The umpire was partial. *See id.* at 41-46.
>
> (4) The majority decision reflected an arbitrary and wholly irrational departure from, and manifest disregard of, governing law and the terms of the insurance policies at issue. *See id.* at 47-50.

(Cont'd)

> Paragraph 2(c) just compounds this felony by requiring documented medical evidence, examination or treatment. The insurance policies make no such requirement . . . . .
>
> Paragraph 3, other than being verbose and hard to understand, is not particularly objectionable, except to the extent it appears to rule out payments into the qualified settlement trust as covered.

Dow Mem., Ex. 5.

Appendix B

AFFIDAVITS

In support of its argument before this court that the arbitration decision should be vacated, Dow Corning submitted affidavits from Kenneth S. Abraham, and William H. Webster. *See* Dow Mem., Ex. 2, Ex. 3. Safety filed a Motion to Strike the Affidavits of Mr. Abraham and Judge Webster. *See* Doc. 54. Neither of these individuals testified at the arbitration between the parties.

In his affidavit, Mr. Abraham states that he is a law professor at the University of Virginia, where he teaches insurance law, evidence and torts. *See* Dow Mem, Ex. 2 at ¶ 4. In his affidavit, Mr. Abraham offers his opinion, after reviewing the arbitration decision in this matter and relevant case law, that the arbitration decision represents a manifest disregard of the law and that the rulings of Umpire Lyon were incorrect. *See id.* at ¶¶ 9-21. Mr. Abraham opines as to the definition of terms in the arbitration clause at issue; opines regarding judicial interpretation of similar contractual obligations; and opines that Dow Corning should have been permitted to cross examine. Safety's witness "concerning why Safety National asserted that . . . a symptoms-emergence trigger governed breast implant claims." *Id.* at ¶¶ 16-21.

Dow also submitted an affidavit from Judge Webster, who is a distinguished jurist and who has served as Director of the Federal Bureau of Investigation, as Director of the Central Intelligence Agency, and as an arbitrator. *See id.*, Ex. 3. In his affidavit, Judge Webster opines that the arbitration decision accepted Safety's position by requiring "'actual personal injury' during the 1983-84 policy period."

Id. at ¶ 25. Judge Webster states that, in his opinion, Umpire Lyon's "separate ex pane contacts with Safety's counsel and Dow Corning's counsel were improper;" that harm may have occurred from these contacts; and that these contacts "violated prevailing standards of arbitrator ethics and the panel's own prohibition." *Id.* at ¶¶ 30-35.

Dow Corning argues that the court should consider the affidavits of Mr. Abraham and Judge Webster. *See* Dow Reply at 19-22. In support of this position it states that the reason that Safety sought a second extension of time to file its response was that it needed the time to retain expert witnesses. Dow Corning argues that because Safety does not offer such experts, the substance of Dow Corning's experts, affidavits goes unrefuted. *See id.* at 19-20. Dow Corning suggests that suggests that Safety is looking for "the easy way out," by filing its motion to strike. *Id.* at 20. The undersigned finds that Safety's motives in filing the motion to strike are irrelevant. Rather, the court will address the dictates of the law.

The Eighth Circuit holds that expert opinion testimony is not admissible regarding questions of law.[5] *See Peterson v. City of Plymouth*, 60 F.3d 469, 475 (8th Cir. 1995). "Legal conclusions [are] for the court to make." *Id.*; *see also Nieves Villaneuva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997) ("In our legal system, purely legal questions . . . [are] exclusively the domain of the judge.").

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5. Judge William H. Webster acknowledges, in his affidavit, that he is "mindful that the [c]ourt will ultimately decide Dow Corning's motion under legal-standards, including those prescribed by the Federal Arbitration Act. . . . It should go without saying that it is for the courts (and not expert witnesses) to determine the appropriate legal standards." *See* Dow Mem., Ex. 3 at ¶ 7.

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Under Fed. R. Evid. 702, which governs the admissibility of expert testimony, expert testimony which offers a legal opinion is not admissible. *See Kostelecky v. NL Acme Tool/NL Indus.. Inc.*, 837 F.2d 828, 830-31 (8th Cir. 1988). Rule 702 does not permit "an expert to interpret a legal document and substitute his judgment for that of the court." *See Eastern Associated Coal Corp. v. Aetna Cas. & Surety Co.*, 475 F. Supp. 586, 592 (W.D. Pa. 1979) (citation omitted), *rev'd in part on other grounds*, 632 F.2d 1068 (3rd Cir. 1980). Expert testimony regarding the meaning of an insurance contract is not permitted. *See id.* at 592. Rather, "interpretation of insurance contracts is a matter for the court." *Id.*

Expert opinion is admissible to "assist the trier of fact to understand the evidence or to determine a fact at issue." Fed. R. Evid. 702. The rule for admission of expert testimony may be construed broadly. *See Arcoren v. United States*, 929 F.2d 1235, 1239 (8th Cir. 1991) (citation omitted).

The affidavits of Mr. Abraham and Judge Webster include their opinions regarding legal conclusions and interpretation of documents. These affidavits go beyond opining on mixed questions of fact and law, but rather attempt to tell the court what result to reach. As such, the court finds that the affidavits of Mr. Abraham and Judge Webster are not admissible. *See United States v. Whitted*, 11 F.3d 782, 785 (8th Cir. 1993) (holding that expert opinion which tells the court what result to reach is not admissible). Pursuant to Rule 702, the court will not consider the legal conclusions and interpretation of documents offered by Mr. Abraham and Judge Webster in their affidavits.

Appendix B

DISCUSSION

The Federal Arbitration Act ("FAA"), 9 U.S.C. & 1 et seq.:

Congress enacted the FAA to "establish a 'national policy favoring arbitration.'" *UHC Mgmt. Co. v. Computer Sciences Corp.*, 148 F.3d 992, 995 (8th Cir. 1998) (*UHC*) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Congress did intend that commercial arbitration agreements be "'enforced according to their terms.'" *Id.* (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (*First Options*). Moreover, questions regarding arbitration, including whether it is binding, must be addressed "with a healthy regard for the federal policy favoring arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 626 (1985). When interpreting an agreement covered by the FAA, "due regard" must be accorded this federal policy. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (*Mastrobuono*).

"The [FAA] establishes, that as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr.*, 360 U.S. 1, 24-25 (1995). Moreover, courts have held that where "a court finds that the parties have agreed to submit to arbitration disputes 'of any nature or character' or simply 'any and all disputes,' all questions, . . . will be properly consigned to the arbitrator." *Rochdale Vill., Inc. v. Public Serv. Employees Union*, 605 F.2d 1290, 1295 (2nd Cir. 1979) (citing *United*

Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 571 (1960) (Brennan, J, Harlan, J. concurring). "Under the [FAA], 'the grounds for challenging an arbitration award are narrowly limited, reflecting the voluntary contractual nature of commercial arbitration.'" *Delta Mine Holding Co. v. AFC Coal Props, Inc.*, 2001 WL 1764243 at *3 (8th Cir. Dec. 28, 2001) (*Delta Mine*) (quoting *IDS Life Ins. Co. v. Royal Alliance Assoc., Inc.*, 266 F.3d 645, 649 (7th Cir. 2001) (*IDS Life Ins.*). In reviewing an arbitration award, federal courts are bound by § 10(a) of the FAA, which sets forth, in relevant part, the following grounds for vacating an award:

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

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The Eighth Circuit has stated that only these statutory grounds for judicial review of arbitration awards as set forth in "§ 10(a) of the Act justify vacating an award; arbitration rules and ethical codes 'do not have the force of law.'" *Delta Mine*, 2001 WL 1764243 at *3 (quoting *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680 (7th Cir. 1982). "'Unless there is a specific [statutory] ground for vacating an award, it must be confirmed.'" *Id.* at *4 (quoting *IDS Life Ins.*, 266 F.3d at 650) (other citations omitted). "[B]eyond the grounds for vacation provided by the FAA, an award will be set aside where it is completely irrational or evidences a manifests disregard of the law." *Hoffman v. Chargill Inc.*, 236 F.3d 458, 461 (8th Cir. 2001) (*Hoffman*). "Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication." *Id.* at n.12. As further stated by the Eighth Circuit:

> [T]his result may seem draconian, [however] the rules of the law limiting judicial review and the judicial process in the arbitration context are well established and the parties [who are] both sophisticated in the realms of business and law, can be presumed to have been well versed in the consequences of their decision to resolve their disputes in this manner.

Stroh Container Co. v Delphi Indus Inc., 783 F.2d 743, 751 (8th Cir. 1986) (*Stroh*).

With the above principles in mind, this court considers Dow Corning's Motion to Vacate.

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GROUND 1(a):

Dow Corning argues that the arbitration decision should be vacated pursuant to § 10(a)(4) of the FAA because the arbitration panel exceeded its powers by deciding that its decision would be binding upon the parties. *See* Dow Mem. at 12-13. Dow Corning suggests that, even if the parties agreed to submit the issue of coverage to arbitration, the arbitrators had no authority to determine whether their award would be binding. Dow Corning suggests that for arbitration to be binding, the language providing for arbitration must make clear that it is "final and binding." Dow Mem. at 17.

In response, Safety argues that the consent order, under which the parties agreed to submit their dispute to arbitration, "completely eviscerates [Dow Corning's] argument." Safety Mem. at 15. Safety further argues that, even without the consent order, there should be a judicial presumption that the parties intended the result of the arbitration would be final. *See id.*

The United States Supreme Court held in *First Options*, 514 U.S. at 943, that "the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute." If the parties agreed "to submit the arbitrability question itself to arbitration, . . . then the court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate." *Id.* (citations omitted). The Court continued to hold that, "[i]f, on the other hand, the parties did not agree to submit the arbitrability question itself to arbitration, then the court

should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently." *Id.* The Court, however, did hold that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* at 944 (citation omitted).

The arbitration provision in the matter under consideration does state that "any right of action under [the insurance policies issued by Safety for the benefit of Dow Corning] shall be submitted to a board of arbitration." *See* Dow Mem., Ex. 18. Thus, the arbitration provision specifies the nature of the disputes between the parties which are subject to arbitration. Clearly, the dispute over whether the insurance polices at issue cover breast implant liability, was an issue of liability under the policies. The policy provision, however, does not state that it within the arbitrators' authority to determine whether their decision is binding. Therefore, pursuant to *First Options*, this court will decide this issue "independently." 514 U.S. at 943.

Dow Corning argues that "the plain language of the arbitration agreement makes clear that the parties agreed to non-binding arbitration as a condition precedent to litigation. *See* Dow Mem. at 18. Safety argues that federal courts hold that condition precedent language should not be interpreted in a manner which suggests that parties intend arbitration to be non-binding. *See* Safety Mem. at 17 (citing *Rainwater v. Nat'l Home Ins. Co.*, 944 F.2d 190, 194 (4th Cir. 1991) (*Rainwater*) (*McKee*). In *Rainwater*, the Fourth Circuit held that:

> [The court] read[s] "condition precedent" to some extent as an unartful leftover from the days of

> hostility toward arbitration. To the extent the phrase has meaning, we find that it does not undermine the binding nature of arbitration but instead applies to the confirmation process permitted by [the FAA] or to other litigation in which the arbitration award would be final but just a sub-test in some larger litigation context.

944 F.2d at 194; *see also McKee v. Home Buyers Warranty Corp. II*, 45 F.3d 981, 984 (5th Cir. 1995) (holding that condition precedent language "does not undermine the binding nature of litigation").

The arbitration provision in the Safety insurance policies states that submission of a dispute to arbitration is a "condition precedent to any right of action under the policy." Dow Mem., Ex. 18. Despite any alleged ambiguity in the insurance contracts regarding the binding nature of arbitration, Dow Corning agreed to dismiss Safety from litigation, the results which would have been "binding," in return for the parties' agreeing to arbitrate their dispute.

Not only did the parties reach an agreement to engage in binding arbitration, as part of the tort litigation in Michigan, but they signed the consent order in United States Bankruptcy Court agreeing that the arbitration would be final. The consent agreement in the bankruptcy proceedings contemplated future litigation on "matters of such insurance coverage and liability not resolved in such Arbitration." Dow. Mem.. Ex. 58 at ¶ 3. The consent order, moreover, specifically refers to the results of the arbitration between the parties as being "fully and finally adjudicated in the existing arbitration." *Id.*

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In its Reply, Dow Corning argues that the circumstances of the consent order preclude its application as "trump card on the binding/nonbinding issue." Doc. 64, Dow Corning Reply ("Reply") at 10. Dow Corning argues that when put in context of the language of paragraph three of the consent order, the "fully and finally" language does not mean that the arbitration was to be non-binding. Rather, Dow Corning contends this language does not alter the non-binding nature of the litigation. In support of this position, Dow Corning points to the fact that it reserved its rights on the binding/non-binding issue, both before and after the issuance of the consent order. *See id.* at 11-12. Dow Corning further argues that "the bankruptcy court consent decree concerned a totally different subject matter (contingent claims that Safety might have to money in Dow Corning's bankruptcy escrow account) than the insurance coverage arbitration." *Id.* at 12.

The consent order makes an explicit reference to the finality of determinations made in the arbitration, and thus, it contradicts Dow Corning's argument that the consent order does not suggest that the arbitration is binding. Even if the primary concern of the bankruptcy court was not the arbitration at issue in this matter, the consent order's reference to the finality of issues submitted in the arbitration is clear and unequivocal. The bankruptcy court did acknowledge that there might be future litigation regarding the insurance policies issued by Safety. The consent order, however, states that this litigation would involve matters not covered by the arbitration, as well as enforcement of the arbitration decision. Thus, the bankruptcy court's reference to future litigation does not trump its reference to the finality of the arbitration. Additionally, Dow Corning cannot claim that the arbitration

was non-binding merely because it reserved its right to make this self-serving claim. Because the bankruptcy court's consent order addresses the finality of arbitration, and because the plain meaning of the condition precedent language in the insurance policies does not foreclose the conclusion that the parties intended arbitration to be binding, the court finds that any ambiguity regarding the binding nature of the arbitration was resolved by the bankruptcy court's consent order. *See Rainwater*, 944 F.3d at 194.

Dow Corning further argues that pursuant to the Missouri Arbitration Act, Mo. Rev. Stat. § 435.350, any agreement in an insurance contract to submit a controversy to arbitration is invalid. *See* Dow Mem. at 19. Mo. Rev. Stat. § 435.350 states that "[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract, except contracts of insurance and contracts of adhesion, to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable." Dow Corning argues that because of this Missouri provision, "Safety could not have intended arbitration as an exclusive remedy, since any agreement would have been void under the law of Safety's home state." Dow Mem. at 20. Safety argues that Dow Corning should not be permitted to raise this issue for the first time pursuant to its effort to set aside the arbitration decision. *See* Safety Mem. at 19. As noted by Dow Corning in its Reply, Safety offers no other arguments in support of its position.

The Eighth Circuit holds that:

> The parties to an arbitration may waive procedural defects by failing to bring such issues to the

> arbitrator's attention in time to cure the defects. (citation omitted) . . . "[I]t is imperative to an efficient and fair administration of justice that a litigant may not withhold his objections, await the outcome, and them complain that he was denied his rights if he does not approve of the decision." (citation omitted).

Bhd. of Locomotive Eng'rs Int'l Union v. Union Pac. R.R. Co., 134 F.3d 1325, 1331 (8th Cir. 1998) (*Union Pacific*). Neither party has addressed the issue of whether Dow Corning's failure to address the relevance of Mo. Rev. Stat. § 435.350 prior to its attempt to set aside the arbitration decision is a procedural issue, and thus, subject to waiver. The court notes that the policy behind the waiver doctrine, as stated by the Eighth Circuit in *Union Pacific*, is applicable in this matter, because Dow Coning waited until it knew the outcome of the arbitration to argue that the Missouri statute's application voided the arbitration decision.

The Eighth Circuit held in *Johnson Controls, Inc., v. City of Cedar Rapids*. 713 F.2d 370, 373 (8th Cir. 1983), that when exercising its limited review of an arbitration award:

> The [federal] court must apply federal substantive law, although applicable non-discriminatory state law may provide a helpful reference in formulating the federal rule of decision. (citations omitted). The court must be guided by "the liberal federal policy favoring arbitration" in contracts governed by the [FAA]. (citation omitted).

Id.

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The McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1994), provides that "[n]o act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." The United States District Court for the Western District of Missouri has held that Mo. Rev. Stat. § 435.350, which prohibits mandatory arbitration provisions in insurance contracts, falls within the protection of the McCarran-Ferguson Act, and thus, is not pre-empted by the FAA. *See Standard Sec. Life Ins. Co. v. West*, 127 F. Supp.2d 1064, 1068 (W.D. Mo. 2000) (*Standard Security*), aff'd, 267 F.3d 821 (8th Cir. 2001) (per curium). In *Standard Security*, the district court found that the Missouri statute was subject to the McCarran-Ferguson Act and that the Missouri statute's prohibition against arbitration in insurance contracts trumped the FAA.[6] *See id.* The facts of *Standard Security*, however, are distinguishable from the matter under consideration, for in *Standard Security*, the insured raised

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6. In a per curium opinion in *Standard Sec. Life Ins. Co. v. West*, 267 F.3d 821, 823 (8th Cir. 2001), the Eighth Circuit held that:

> In accordance with . . . the McCarran-Ferguson Act, inverse-preemption operates to bar application of the FAA if (1) the FAA does not specifically relate to the business of insurance, (2) the FAA would invalidate, impair, or supersede section 435.350, and (3) section 435.350 was enacted for the purpose of regulating the business of insurance.

The court concluded that Mo. Rev. Stat. § 435.350 does regulate the business of insurance; that this statute's prohibition against arbitration clauses in insurance contracts involves the business of insurance; and that, therefore, the district court concluded correctly that inverse-preemption applies. *See id.* at 823-24.

the issue of inverse-preemption upon the insurance company's request to arbitrate. Dow Corning did not raise this issue until after it received an unfavorable arbitration decision. *See Union Pacific*, 134 F.3d at 1331. More significantly, in the matter under consideration, the obligation to arbitrate arguably arises from other than a contract for insurance. It arguably arises from the parties' stipulation in the Michigan tort litigation and from the consent order of the bankruptcy court. In *Standard Security*, the agreement to arbitrate appeared only in the insurance policy issued to an individual.

Considering that the parties' obligation to arbitrate their dispute did not arise solely from a contract for insurance and that Dow Corning did not allege inverse-preemption until after the arbitration panel issued its decision, the court finds that Mo. Rev. Stat. § 435.350 neither voids the arbitration decision, nor does it establish that the parties did not intend for the arbitration to be non-binding.

Dow Corning further cites Mo. Rev. Stat. § 435.460 in support of its position that the arbitration decision at issue is not binding, nor was it meant to be binding. This Missouri statute requires that "each contract subject to" Mo. Rev. Stat. § 435.350 to §435.470 state that "THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES." The statute requires that this language be set forth in ten point capital letters. Because the insurance policies at issue did not include such language, Dow Corning suggests that, pursuant to Missouri law, the arbitration provisions contained therein are not binding. Safety does not address this issue. Arguably, if Mo. Rev. Stat. § 435.460 is applicable to the policies at issue, the arbitration clause in these

policies might not be enforceable, because the policies at issue did not comply with Mo. Rev. Stat. § 435.460. *See Standard Security*, 267 F3d at 1066-68.

Mo. Rev. Stat. § 435.460, however, does not regulate the business of insurance because this law does not have the effect of spreading risk; this law is not "an integral part of the policy relationship between" the parties; and this law is not limited to the insurance industry. *See Standard Security*, 267 F.3d at 1067. Rather, § 435.460 is applicable to §§ 435.350-.470 of the Missouri Arbitration Act. The McCarran-Ferguson Act and inverse-preemption, therefore, do not apply to Mo. Rev. Stat. § 435.460, and this matter is controlled by the FAA. *See Standard Security*, 267 F.3d at 1066. Because the FAA controls, § 435.460 neither voids the arbitration decision at issue, nor establishes that the parties did not intend for arbitration to be binding. Moreover, Dow Corning has raised this issue for the first time before this court. *See Union Pacific*, 131 F.3d at 1331.

When determining the meaning of arbitration agreements, the Supreme Court has stated that "courts generally should apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944. Applying contract law to the undisputed facts in the matter under consideration, the court finds that, by entering into the December 1994 agreement and pursuant to the consent order of the bankruptcy court, the parties agreed to binding arbitration on the issue of whether the policies provided coverage for the breast implant litigation.[7] The court concludes that the arbitrators' authority to

7. 1. "[T]he common-law rule of contract interpretation that a court should construe ambiguous language against the (Cont'd)

determine whether the arbitration is binding is a moot issue, because of the parties' stipulation and because of the consent order entered by the bankruptcy court. Thus assuming, arguendo, that the arbitrators did not have authority to determine whether the arbitration was binding, pursuant to the authority vested in this court by *First Options*, the court finds that the parties intended for arbitration to be binding. Therefore, Dow Corning's Ground 1(a) fails to state a basis upon which the arbitration award should be set aside.

GROUND 1(b):

Dow further argues that the arbitrators exceeded their powers, in violation of § 10(a)(4) of the FAA, by retaining jurisdiction over the case after the resignation of Safety's party-appointed arbitrator, Mr. Nelson. *See* Dow Mem. at 21. In particular Dow Corning asserts that, because the arbitrators were not appointed by the method specified under contract, the arbitration panel exceeded its authority. *See id.* Dow Corning contends that the substitution of Mr. Hyland, for Mr. Nelson, after Umpire Lyon had been

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(Cont'd)

interest of the party that drafted it," is applicable to ambiguous arbitration agreements. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (citing Restatement (Second) of Contracts § 206; *see also United States v. Seckinger*, 397 U.S. 203, 210 (1970)). The arbitration provision in dispute appears in policies prepared by Safety. The language of the parties' December, 1994 agreement, however, is not ambiguous, and there is no suggestion by Dow Corning that it did not participate equally, with Safety, in drafting that agreement.

selected, "ran afoul of the arbitrator selection method prescribed by Safety's policy," because the two party-appointed arbitrators did not select the umpire before instituting the hearing. *Id.* at 22.

Parties may determine, by contract, the method under which their arbitrators will be appointed. *See, e.g., Hugs & Kisses, Inc. v. Aguirre*, 220 F.3d 890, 893 (8th Cir. 2000) (*Hugs & Kisses*). The Eighth Circuit has acknowledged that "arbitrators are without authority where they are not chosen as provided in the parties' arbitration agreement." *Id.* (citations omitted). When an arbitrator exceeds his or her authority, the resulting decision may be vacated under § 10(a)(4) of the FAA. *See id.* Dow Corning argues that, it follows from this rule of law that, "where a vacancy is created on a multiple-person arbitral panel through the resignation, withdrawal, or death of one of the arbitrators prior to the award, the arbitration must commence anew with a reconstituted panel[,] absent a provision in the arbitration agreement anticipating such a circumstance." *See* Dow Mem. at 21.

In support of its position, Dow Corning cites the Eighth Circuit's decision in *Backus-Brooks, Co. v. Northern Pacific Railroad, Co.*, 21 F.2d 4 (8th Cir. 1927) (*Backus-Brooks*). In *Backus-Brooks*, where the arbitration agreement made no provision for filling vacancies, one arbitrator died and the other became incapacitated. *See id.* at 13. Significantly, in *Backus-Brooks* the parties' arbitration agreement named one arbitrator and a replacement arbitrator, in case of the inability of the first individual to serve. *See id.* at 9. The arbitration proceedings in *Backus-Brooks* had commenced prior to the death and incapacitation, respectively, of the named arbitrators. It was

under the limited circumstances of *Backus-Brooks* that the Eighth Circuit held that the submission of the parties' dispute to arbitration was revoked. *See id.* at 13. In the matter under consideration, neither the insurance policies, the parties 1994 agreement, or the bankruptcy court's consent order suggest that their agreement to arbitrate was contingent upon particular individuals serving on the arbitration panel. Thus, the circumstances of *Backus-Brooks* are distinguishable from the matter under consideration.

Additionally, Dow Corning relies on the Second Circuit's opinion in *Marine Products Export Corp. v. M.T. Globe Galaxy*, 977 F.2d 66 (2nd Cir. 1992) (*Marine Products*). In *Marine Products*, a three-person arbitration panel held evidentiary hearings and made interlocutory rulings prior to the death of a panel member. The Second Circuit held that there is a general rule that where "one member of a three-person arbitration panel dies before rendering an award and the arbitration agreement does not anticipate that circumstance, the arbitration must commence anew." *Id.* at 68. In *Marine Products*, however, the arbitration panel held evidentiary hearings and made rulings prior to the death of one of the arbitrators, unlike the matter under consideration where proceedings had not commenced prior to Mr. Nelson's resignation.[8]

8. In *Marine Products Export Corp. v. M.T. Globe Galaxy*, 977 F.2d 66 (2d Cir. 1992), the Second Circuit relied upon 49 A.L.R.2d 900, 903-05 (1956). This annotation does cite examples of courts granting vacatur of arbitration decisions when an arbitrator died or resigned after arbitration proceedings had commenced, but prior to the issuance of a decision. This A.L.R. annotation also cites cases where proceedings commenced, prior to the death or resignation of an arbitrator, but where the courts found that the decision issued by the remaining panel members was valid. *See, e.g., S.E.R. v. Connecticut Co.*, 112 A.2d 501 (Conn. 1955).

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Cia De Navegacion Omsil. S.A. v. Hugo Nev Corp., 358 F. Supp. 898 (S.D.N.Y. 1973), also cited by Dow Corning in support of Ground 1(b), involved the death of a member of an arbitration panel after hearings were held. Likewise, this case is distinguishable from the matter under consideration where Mr. Nelson resigned prior to the commencement of proceedings. *See* Dow Mem. at 22.

Cases cited by Dow Corning suggest that prejudice may be presumed when an arbitrator dies or resigns subsequent to the commencement of proceedings but prior to the issuance of a decision, and is replaced. These cases, however, do not suggest that prejudice should be presumed where a party-appointed arbitrator is replaced prior to the commencement of proceedings. Significantly, Mr. Nelson resigned prior to any organizational meetings of the arbitration panel. *See* Safety Mem., Ex 15 at ¶ 4. The undersigned finds that the facts that Mr. Nelson resigned prior to the commencement of arbitration, arid that Mr. Nelson was Safety's party-appointed arbitrator, do not suggest that Dow Corning was prejudiced by the arbitration panel's determination that it should proceed with the arbitration.

Additionally, the Eighth Circuit has clarified that procedural issues, which are attendant to a matter subject to arbitration, are for the arbitration panel to decide. *See El Dorado Sch. Dist. #15 v. Cont'l Cas., Co.*, 247 F.3d 843, 846-47 (8th Cir. 2001) (*El Dorado*); *Stroh*, 783 F.2d at 748 (citing *John Wiley & Sons v. Livingston*, 376 U.S. 543, 557 (1964)). The Eighth Circuit held in *Stroh* that "this rule of deference is founded on the recognition that (1) procedural questions are often intertwined with the merits of the dispute

and (2) the reservation of procedural issues for the courts provides an opportunity for serious delay and duplication of effort." *Id.* at 748-49. Moreover, upon reviewing an arbitration award, a court must accord "even greater deference to the arbitrator's decisions on procedural matters than those bearing on substantive grounds." *Id.* at 749 (citing *United Steelworkers of America v Ideal Cement Co.*, 762 F.2d 837, 841 (10th Cir. 1985)). Because the scope of review of procedural determinations is so narrow, the Eighth Circuit held, in *Stroh*, that it was difficult to articulate a standard of review to apply to procedural challenges to arbitration decisions. *See Stroh*, 783 F.2d at 749.

Dow Corning's own party-appointed arbitrator agreed with Umpire Lyon that he and Umpire Lyon should not resign, and that Safety should appoint a replacement. *See* Dow Ex. 29; Safety Mem. at 23. Considering both the deference given to arbitrators regarding procedural issues and the narrow scope of judicial review of arbitrators' procedural determinations, the undersigned finds that the arbitration panel did not exceed its authority, in violation of § 10(a)(4) of the FAA by proceeding with the arbitration subsequent to the resignation of Mr. Nelson and the appointment of his replacement. *See El Dorado*, 247 F.3d at 846-47.

GROUND 2(a):

Dow Corning argues that the arbitration decision should be vacated, pursuant to § 10(a)(3) of the FAA, because Umpire Lyon engaged in prejudicial misconduct and misbehavior. Dow Corning suggests that this misconduct includes Umpire Lyon's initiation of improper and prejudicial

ex-parte communications. Dow Corning alleges that the alleged prejudicial ex-parte conversations involved Umpire Lyon's initiating separate telephone conversations on March 26, 2001, with counsel for Dow Corning and for Safety. *See* Dow Mem. at 29. Dow Corning further argues that these communications violated the panel's own procedural order, as well as ethical guidelines and rules governing arbitrator conduct. *See id.* at 29-30.

In a letter dated March 26, 2001, Dow Corning's counsel confirmed a telephone conversation of that date with Umpire Lyon, which conversation took place in the early afternoon. In this letter, Dow Corning's counsel states that the subject matter of that telephone conversation involved establishing scheduling deadlines and a date and site for a hearing. *See id.*, Ex. 37. Dow Corning's counsel did not mention that his telephone conversation with Umpire Lyon involved any subject other than these procedural matters.

Subsequently, on March 29, 2001, Dow Corning's counsel wrote another letter to Umpire Lyon, in which he confirmed a second ex-parte telephone conversation of March 26, 2001, which conversation took place at about 6:00 p.m. Dow Corning's counsel stated that, in this second telephone conversation, Umpire Lyon discussed potential problems with the testimony of experts. *See id.*, Ex. 38. Dow Corning's counsel said that Umpire Lyon expressed his reservation about an expert because "he had no clinical or medical experience and yet testified in asbestos-related cases." *Id.*, Ex. 38 at 1. Dow Corning's counsel further stated that Umpire Lyon stated that he just "'wanted to make sure' that [Dow Corning's counsel] agreed that this 'type of testimony

shouldn't be allowed in their hearing." *Id.*, Ex. 38 at 1-2. Dow Corning's counsel further stated in this letter of March 29, 2001 that:

> Surprised by this pointed statement, I replied that I had difficulty answering this sort of inquiry other than to note that we did not intend to present testimony by experts who we did not believe were qualified. You concluded the conversation by saying that you had decided to "throw this out" to get across that you "don't want' to hear from this type of expert witness.

Id., Ex. 38 at 2.

Also, in the letter of March 29, Dow Corning's counsel expressed his belief that the substance of Umpire Lyon's second telephone conversation with him, as well as a telephone conversation with Safety's counsel, on the topic of expert testimony, were prohibited ex-parte communication. *See id.* Dow Corning's counsel stated that the particular person to whom Umpire Lyon was objecting was an expert whom Dow Corning intended to have testify and that, "after having engaged in ex-parte communications with [Safety's counsel, Umpire Lyon] made up his mind on the proper qualifications of expert witnesses without first hearing their testimony or hearing argument from [Dow Corning]." *Id.* As a result of this alleged improper ex parte communication, Dow Corning's counsel requested that Umpire Lyon resign. *See id.*, Ex. 38 at 2-3.

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After Dow Corning's letter of March 29, 2001, the parties' lawyers exchanged several letters to each other and to Umpire Lyon, concerning the allegations of the March 29 letter. *See id.*, Ex's. 39-47. Umpire Lyon wrote a letter, dated April 9, 2001, in response to Dow Corning's allegation of improper ex-parte communication and its request that the panel members resign. *See id.*, Ex. 48. In this letter to Dow Corning's counsel, Umpire Lyon stated, in pertinent part, that:

> You have completely misinterpreted and wrongly characterized my comments during our second telephone conversation of March 26, 2001.
>
> Hopefully, a description of all that actually occurred that date will provide you with a better understanding of that telephone conversation.
>
> Earlier that date, Mr. Hyland had advised that it would be difficult if not impossible for him to be at the scheduled May 7-11, 2001, hearing because of his wife's surgery. . . . I then called Mr. Schenck to determine his availability.
>
> As Mr. Epting (Safety's counsel) was in trial away from his office, it appeared improbable that a telephone conference among the three of us could be arranged for several days at best. Knowing when Messrs. Hyland and Schenck would be available, I then called you. It became apparent that the only mutually convenient week for the hearing would be either the week of June 4 or 11 or then not for at least another month which because of previous delays caused some concern. . . .

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Surprisingly, Mr. Epting was able to call that afternoon and advised that he could only be available the week of June 4, but that it would be difficult for him to extend to that Saturday the ninth should that become necessary.

My concern was then whether the hearing could be properly completed in five days. . . .

When asked, Mr. Epting advised that he could probably present his case in two days, but might need more. I mentioned that it might be helpful if expert witnesses only testified about those matters where there was actual, direct experience and education. Mr. Epting was in agreement. . . . *Not at any time during this conversation was there even the slightest reference to any individual or any potential witness.*

With this same concern in mind about being able to properly conclude in five days, I called you the second time advising you of my conversation with Mr. Epting. When asked how much time you would need to present your case plus rebuttal, you seemed somewhat noncommittal. To be helpful and to ascertain if you were in agreement as was Mr. Epting, I then put forth my comments about expert witnesses. I stated that it would be preferable to have expert witnesses only testify about matters where they had an educational background and direct, actual experience and accordingly, if there was to be expert testimony

> about breast implant medical problems, that such experts should have a medical and/or clinical background.
>
> When it seemed that I wasn't getting through to you, I offered two actual examples of expert witnesses. . . . [A]n understanding didn't appear possible, . . . and the call simply ended on the basis of your agreeing to determine and then advise if your witnesses could be available during the week of June 4, 2001. *However, not at any time during this conversation were you told that the panel would not hear the testimony of any witness.*

Id., Ex. 48 at 1-2 (emphasis of Umpire Lyon).

Umpire Lyon further stated, in this letter, that he gave two actual examples of experts; that he did not have any idea that the individual in his second example might be Dow Corning's expert; and that this only became apparent in subsequent letters from Dow Corning's counsel. *See id.* Ex. 48 at 2. Umpire Lyon opined that the telephone conversations to which Dow Corning was objecting were "administrative in nature." *Id.* Umpire Lyon concluded the letter by stating that, at age 70, he was "comfortably retired;" that he had "prostate cancer in transition;" and that, at that point, there were not any influences or incentives other than to proceed with the arbitration as "completely and fairly as possible." *Id.*, Ex. 48 at 4.

The court first notes that the panel's procedural guidelines provided that, under certain circumstances,

the umpire could communicate directly with the parties. *See id.*, Ex. 32. All three arbitrators, including Dow Corning's party-appointed arbitrator, agreed that ex-parte communications were permitted regarding administrative matters "when to do so otherwise would be difficult or overly time consuming. *See id.*

Umpire Lyon's conversation with Dow Corning's counsel, as reflected in that counsel's letter of March 29, 2001, does not reflect that Umpire Lyon solicited argument, but rather this letter reflects that Umpire Lyon expressed an evidentiary preference. Moreover, Dow Corning concedes that Umpire Lyon had the same allegedly improper conversation with counsel for both sides of this dispute. Therefore, the court concludes that, when considered in context, Umpire Lyon's telephone conversations with counsel on March 26, 2001, reflect his role as umpire and the attendant duty to assure that the arbitration proceeded in an efficient manner, without difficulty or delay. Considering the narrow scope of review of an arbitrator's procedural determinations, and the deference given to an arbitrator's procedural determinations, the court will not second guess Umpire Lyon's conclusion that the ex-parte conversations were not in violation of the panel's procedural guidelines. *See Delta Mine.* 2001 WL 1764243, at *5; *El Dorado*, 247 F.3d at 847; *Stroh*, 783 F.2d at 748.

In regard to Dow Corning's argument that Umpire Lyon's alleged ex-parte communications violated ethical standards, the Eighth Circuit recently held:

> It is well established that only statutory grounds in § 10(a) of the Act justify vacating an award; arbitration rules and ethical codes "do not have the

> force of law." (citations omitted). Thus, the district court erred in placing primary emphasis on whether [a] party arbitrator [ ] violated various provisions of the Code of Ethics. "Unless there is a specific [statutory] ground for vacating an award, it must be confirmed." (citations omitted).

Delta Mine, 2001 WL 1764243, at *3.

Therefore, assuming, arguendo, that Umpire Lyon's alleged ex-parte communications were unethical, pursuant to any code applicable to arbitrator conduct, such alleged conduct necessarily does not provide a basis for setting aside the arbitration decision in this matter.

Additionally, in *Delta Mine*, the Eighth Circuit held that a party seeking to vacate an arbitration decision based on "undue means," pursuant to § 10(a)(1), or based on "misbehavior," pursuant to § 10(a)(3) of the Act, "must demonstrate that [the alleged unethical conduct] influenced the outcome of the arbitration." *Id.* at *6. The Eighth Circuit articulated that the burden of a party attempting to establish this influence is "substantial." *Id.*

Dow Corning argues that prejudice is established because Safety's counsel was permitted to make legal arguments to Umpire Lyon outside the presence of Dow Corning's counsel. *See* Dow Mem. at 32. Dow Corning does not suggest that Umpire Lyon prevented it from presenting the testimony of the allegedly objectionable expert or of any other expert. Significantly, in its Reply, Dow Corning states that it presented six experts during the course of the arbitration,

while Safety only presented three. Most significantly, the expert whom Umpire Lyon gave as an example, in the March 26, 2001, conversation with Dow Corning's counsel, did testify. *See id.* at 33 n.19. Dow Corning argues that this expert's testifying does not cure the prejudice it suffered as a result of Umpire Lyon's ex-parte conversations. The court finds, however, that the fact that Umpire Lyon permitted the expert to testify suggests that Dow Corning was not prejudiced. *See El Dorado*, 247 F.2d at 848 (quoting *Grahams Serv. Inc., v. Teamsters Loc. 975*, 700 F.2d 420, 422 (8th Cir. 1982) ("To constitute misconduct requiring vacation of an award, an error in the arbitrator's determination 'must be one that is not simply an error of law, but which so affects the rights of a party that it may be said the [party] was deprived of a fair hearing.'" . . . "[E]ach party must be given an opportunity to present its arguments and evidence.").

Dow Corning further argues that Umpire Lyon's conduct constitutes prejudice under the Eighth Circuit's holding in *United Food and Commercial Workers Int'l Union v. SIPCO*, 8 F.3d 10 (8th Cir. 1993) (*SIPCO*). In *SIPCO*, the court found that the arbitrator's allowing "an interested, non-party to be present throughout the duration of the hearing[,] in combination with the arbitrator's active solicitation of ex parte evidence and ex parte consultations[,] precluded" the party seeking vacatur from having a fair hearing. 8 F.3d at 10. Because the Eighth Circuit issued its decision in *SIPCO* pursuant to 8th Cir. R 47B, the court did not articulate the basis for its reaching this conclusion, but rather adopted the reasoning of the district court. *See id.*

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The district court, in *SIPCO*, explained that the attorney, who represented a non-party who had an interest in the outcome of the arbitration, and who had a long term personal and business relationship with the arbitrator, met with the arbitrator prior to the hearing. *See SIPCO*, 1992 WL 455167, at * 4 (S.D. Iowa Dec. 30 1992). The attorney representing the non-party also met with counsel for the employer arbitration-respondent. These meetings were not disclosed to the union arbitration claimant. Over the objections of the union arbitration-claimant, the arbitrator permitted the attorney representing the non-party union to participate in the arbitration. *See id.* During the course of the hearing, the non-party's counsel engaged in ex-parte communications with the arbitrator. In his decision, the arbitrator relied upon evidence not introduced by either party, but which was gathered after the close of the arbitration hearing by a representative of the non-party.

Upon vacating the arbitration award, the district court found that "numerous actions of the arbitrator constituted misconduct, whether considered as separate events or in their cumulative effect, and the [unions who were arbitration-claimants] clearly demonstrated that the misconduct in its entirety prejudiced their rights, deprived them of a fair hearing, and influenced the outcome of the arbitration." *Id.* at *9. The egregious conduct of the arbitrator in *SIPCO*, however, is distinguishable from the allegedly improper ex-parte communications in the matter under consideration. In this matter, the arbitration panel considered only evidence introduced by the parties, and both parties were aware of the substance of Umpire Lyon's ex-parte conversations prior to the panel's issuing its decision. Also, Dow Corning does not

suggest evidence, other than the outcome of the arbitration, in support of its position that the ex-parte conversations influenced the arbitration panel's decision. *See Delta Mine*, 2001 WL 1764243, at *6 (holding that a party seeking to vacate an arbitration award based on undue means or misbehavior "must demonstrate that the conduct influenced the outcome of the arbitration"); *Painwebber Group, Inc. v. Zinsmeyer Trusts P'ship*, 187 F.3d 988, 994 (8th Cir. 1999) (*Painwebber*) (holding that "there must be some causal relation between the undue means and the arbitration award"), *cert. denied*, 529 U.S. 1020 (2000).

As acknowledged by Dow Corning, the pivotal issue for arbitration was the "trigger-of-coverage." *See* Dow Mem. at 33. Dow Corning does not assert that at any time, other than while cross-examining Safety's witness, it was denied the right to address the issue of "trigger-of-coverage." *See* Dow Mem. at 33. As stated above, neither does Dow Corning suggest that it was denied the right to present the testimony of the experts of its choice. Moreover, Dow Corning admits that, on March 26, 2001, Umpire Lyon had the same conversation with both parties. *See id.* at 30-33. The fact that Dow Corning presented the experts of its choice, without limitation or restriction, further evidences that the purpose of Umpire Lyon's telephone conversations with the parties' attorneys was administrative.

The undersigned concludes that Dow Corning has not established that it was prejudiced or deprived of a fair hearing because of Umpire Lyon's alleged improper ex-parte communications. *See El Dorado*, 247 F.2d at 848. Considering the context and substance of Umpire Lyon's

ex-parte conversations with the parties' attorneys, the court finds that these contacts were consistent with an arbitrator's obligation to "'expedite the proceedings.'" *Painwebber*, 187 F.3d at 995 (quoting *Ballantine Books, Inc. v. Capital Distrib. Co.*, 302 F.2d 17, 21 (2nd Cir. 1962)). The court concludes that the ex-parte conversations with attorneys do not constitute "undue means" or "misbehavior" under §§ 10(a)(1) or (3) of the FAA.[9]

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9. In a footnote, Dow Corning states that Umpire Lyon engaged in a questionable procedure by refusing to accept into evidence an affidavit of David Stryker of Bristol-Myers. *See* Dow Mem. at 37 n.37. The transcript of the arbitration proceeding establishes that Dow Corning's counsel informed the arbitration panel that he sought to introduce this affidavit because "[i]t goes to the pattern and practice that [Dow Corning] believe[s] Safety has pursued." *Id.*, Ex. 12 at 345-46. Safety's counsel objected to the introduction of the affidavit of Mr. Stryker on the ground that documents from a case involving Bristol Myers were not relevant. *See id.* at 345. Umpire Lyon sustained the objection of Safety's counsel and found that "the Bristol-Myers situation was irrelevant to this situation;" that "in the grand scheme of things, [the affidavit] really isn't going to have any impact one way or the other;" and that it "really doesn't seem to have that much impact." *Id.* at 348.

In the event Dow Corning's footnote 16 is meant to argue that vacatur is appropriate because of Umpire Lyon's exclusion of Mr. Stryker's affidavit, the court finds that this ruling does not establish misconduct or misbehavior by Umpire Lyon, in violation of § 10(a)(3) of the FAA. The court further finds that this ruling is within the realm of procedural issues which are properly left for the arbitrator to decide. *See El Dorado*, 247 F.3d at 846. Moreover, Dow Corning has not suggested that the exclusion of Mr. Stryker's affidavit precluded a fair outcome. *See Hoffman v. Chargill Inc.*, 236 F.2d 458, 462 (8th Cir. 2001).

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GROUND 2(b):

Dow Corning argues that the arbitration decision should be vacated because Umpire Lyon engaged in misconduct and misbehavior, pursuant to § 10(a)(3) of the FAA, by his excluding highly material evidence. *See* Dow Mem. at 34. Dow Corning contends that Umpire Lyon should not have precluded its counsel from questioning Safety's claims handler, Mr. Hansen, regarding Safety's position on the trigger of coverage issue in asbestosis matters. *See id.* at 36-41.

Dow Corning states that, as part of his testimony, Mr. Hansen enunciated Safety's "emergence of symptoms" theory as the trigger of coverage for breast implant coverage. *See id.* at 37. Dow Corning contends that in response to this testimony, its counsel sought to question Mr. Hansen about his experience with the trigger of coverage for asbestos claims. Dow Corning states that its counsel further sought to question Mr. Hansen about Safety's allegedly arguing, in the asbestos context, that "policies in effect at the time of exposure -- *before symptoms emerge* -- were the only ones triggered for asbestos insurance coverage under the same policy language here at issue." *Id.* at 37 (emphasis of Umpire Lyon). Umpire Lyon, however, interrupted Dow Corning's counsel in his attempt to question Mr. Hansen about asbestos matters. *See id.*, at 38. Dow Corning argues that Umpire Lyon's explanation for excluding this testimony, based on his belief that "asbestosis and breast implants are two different things," "is entirely unsatisfactory and inappropriate." *Id.* at 39 (citing Dow Mem., Ex. 12 at 1024-26).

Dow Corning further argues that, earlier in the proceedings, its party-appointed arbitrator, Mr. Hyland, made it clear that he thought asbestos case law was relevant, by his questioning Dow Corning's expert about asbestos litigation and its treatment of the trigger issue. *See id.* at 39-40. Dow Corning contends that it was significant that the panel had allowed and initiated discussion regarding hypothetical coverage from a car accident, a slip-and-fall case, and a property damage matter. *See id.* at 40. Dow Corning concludes that, because of Umpire Lyon's alleged improper intervention in the questioning of Mr. Hansen, "the panel was deprived of evidence showing that Safety's trigger theory here was a sham." *Id.* at 41.

As discussed above, the Eighth Circuit holds that a federal court's review of an arbitrator's procedural rulings is more narrow than that applied to matters bearing on substantive grounds, and that procedural issues "should be left to the arbitrator to decide." *El Dorado*, 247 F.3d at 846. In *El Dorado*, upon considering an arbitrator's refusal to postpone a hearing, the court held that for such an alleged error to require vacation of an award, the error "'must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that he was deprived of a fair hearing.'" *Id.* at 848 (citing *Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1016-17 (11th Cir. 1998)).

In arbitration proceedings, participants have "'almost none of the protections that fundamental fairness and due process [usually] require. . . . The rules of evidence are employed, if at all, in a very relaxed manner. The factfinders (here the panel) operate with almost none of the controls

and safeguards [expected in litigation].'" *Hoffman*, 236 F.3d at 462 (quoting *Lee v. Chica*, 983 F.2d 883, 889 (8th Cir. 1993)). "If a 'fundamental fairness' standard exists, it must apply to arbitration schemes so deeply flawed as to preclude the possibility of a fair outcome." *Id.*

By Dow Corning's admission, it was not denied the opportunity to present its own experts on the trigger of coverage issue. Also, by Dow Corning's admission, Mr. Hyland questioned Dow Corning's experts, "at length," regarding asbestos cases and the trigger of coverage issue. *See* Dow Mem. at 39-40. Because Dow Corning was not denied the opportunity to present its own experts, Dow Corning's rights were not affected, nor was it was deprived of a fair hearing, as a result of Umpire Lyon's ruling. *See Hoffman*, 236 F.3d at 463. Because Dow Corning had other opportunities to, and in fact did, present testimony in regard to its trigger of coverage theory, Umpire Lyon's denying Dow Corning the opportunity to cross-examine Mr. Hansen did not preclude the possibility of a fair outcome. *See id.* Therefore, the undersigned finds that Umpire Lyon's failure to permit Dow Corning to cross-examine Mr. Hansen regarding asbestosis was within the realm of procedural issues which are properly left for the arbitrator to decide. *See El Dorado*, 247 F.3d at 846.

Dow Corning also argues that Umpire Lyon based his evidentiary ruling, which precluded cross-examination of Safety's expert, on his incorrect application of the law regarding trigger of coverage. As discussed above, the Eighth Circuit holds that "'[b]eyond the grounds for vacation provided in the FAA, an [arbitration] award will only be set

aside where it is completely irrational or evidences a manifest disregard for the law.'" *Hoffman*, 236 F.3d at 461 (citations omitted). The Eighth Circuit has further stated that a court's "disagreement with an arbitrator's interpretation of the law . . . is an insufficient basis for setting aside his award." *El Dorado*, 247 F.3d at 847. Moreover, it has held that an arbitration decision "manifests a disregard for the law where the arbitrators clearly identify the applicable, governing law and then proceeds to ignore it." *Hoffman*, 236 F.3d at 462 (citations omitted). A court, reviewing an arbitration award, may not set aside the award simply because the "arbitrators erred in interpreting the law" or because the court "might have interpreted the agreement differently." *Id.* (citing *Stroh*, 783 F.2d at 751. Rather, the contract must not be "'susceptible [to] the arbitrator's interpretation.'" *Id.* (quoting *Local 970 v. B.F. Nelson Folding Cartons, Inc.*, 151 F.3d 748, 750 (8th Cir. 1998)).

The Eight Circuit has stated that a "[m]anifest disregard of the law exists when the arbitrator commits an error that was 'obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator." *Marshall v. Green Giant Co.*, 942 F.2d 539, 550 (8th Cir. 1991) (*Marshall*) (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2nd Cir. 1986) (*Bobker*)). The record must establish "'that the arbitrators knew the law and expressly disregarded it.'" *Id.* (citation omitted).

Dow Corning argues that Umpire Lyon's evidentiary ruling can be construed as a manifestation of his belief that trigger of coverage in asbestos cases was not relevant to breast

implant cases. The court will, therefore, consider whether such a conclusion represents a manifest disregard of the law, keeping in mind that, "[w]here arbitration is contemplated, the courts are not equipped to provide the same judicial review given to structured judgments defined by procedural rules and legal principles." *Stroh*, 783 F.2d at 751 n.12.

Cases cited by Safety suggest that some federal courts have held asbestos, which comes from outside the body, is immediately injurious. *See* Safety Mem. at 37 (citing *Guaranty Nat. Ins. Co. v. Azrock Industries, Inc.*, 211 F.3d 239 (5th Cir. 2000); *Neubauer v. Owens-Corning Fiberglass Corp.*, 686 F.2d 570 (7th Cir. 1982); *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc*, 657 F.2d 814 (6th Cir. 1981)). Additionally, the Michigan Supreme Court has noted that, "references to trigger theories can be deceiving. Ultimately, it is the policy language as applied to the specific facts in a given case that determines coverage." *See id.* at 45 (citing *Gelman Sciences, Inc. v. Fidelity & Cas. Co.*, 572 N.W.2d 617, 622 (Mich. 1998)).

Safety argues that the arbitration decision, in the matter under consideration, does not apply a manifestation trigger, but rather applies the injury-in-fact trigger to a specific disease-causing product. *See id.* at 46. Safety further cites *Dow Chemical Co. v. Associated Indemnity Corp.*, 724 F. Supp 474 (E.D. Mich. 1989), and contends that, in that case, the court required that Dow Corning prove that its product, Sarabound, a concrete additive, caused damage. *See id.* at 46. Safety further cites treatise and case authority for is argument that the arbitration "decision is well grounded in both the custom and usage of the insurance industry and the law." *Id.* at 47.

On the other hand, Dow Corning cites treatise and case law authority in support of its position that the arbitration decision "shied away from 'manifestation' (by name) because it is so widely rejected by courts and insurers alike." Dow Mem. at 48 (citing Ostsrager, et al., *Insurance Coverage Disputes* § 9.03 (10th ed. 2000); *E.R. Squibb & Sons. Inc. v. Lloyd's & Cos.*, 241 F.3d 154, 168 (2d Cir. 2001); *American Home Products Corp. v. Liberty Mutual Ins. Co.*, 265 F. Supp. 1485 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984) (other citations omitted).

The court concludes that Umpire Lyon's evidentiary ruling does not reflect that he identified the applicable law and then decided not to follow it. Additionally, there is authority for Umpire Lyon's position. Therefore, the court finds that Umpire Lyon's position, as possibly reflected in his evidentiary rulings, does not represent a manifest disregard of the law.

Because Umpire Lyon's failure to permit the cross-examination of Mr. Hansen regarding asbestosis was not based on a manifest disregard for the law; because Dow Corning had other opportunities to present evidence in regard to its trigger of coverage theory and was not deprived of a fair hearing; and because Dow Corning has not established prejudice as a result of Umpire Lyon's ruling on the cross-examination of Mr. Hansen, the undersigned finds that Umpire Lyon did not engage in misconduct or misbehavior pursuant to § 10(a)(3) of the Act, as alleged in Dow Corning's Ground 2(b).[10] *See El Dorado*, 247 F.3d at 848. The court

10. In a footnote, Dow Corning states that there were "additional pre-hearing irregularities." Dow Mem. at 10 n.4. Dow Corning does

(Cont'd)

makes this finding based on its consideration of individual acts of Umpire Lyon and on its consideration of the cumulative effect of his conduct and rulings.

(Cont'd)

not elaborate on these alleged irregularities, other than to state what they allegedly were. These incidents include "Umpire Lyon's unwillingness to rely on judicial immunity for arbitrators;" his "unwillingness to enforce the traditional arbitral antipathy to discovery depositions;" and his "unwillingness to permit Dow Corning any discovery" to which Safety did not consent. *Id.* In another footnote, Dow Corning also suggests that Umpire should not have required sequestration of its witnesses. *See id.* at 28 n.16. Also, in this second footnote, Dow Corning references numerous statements of, and other procedural rulings by, Umpire Lyon. *See id.* In the event Dow Corning is suggesting that these alleged irregularities and improper statements of Umpire Lyon are grounds for vacatur, the court finds that the conduct of Umpire Lyon, as described in footnotes 4 and 16, involves procedural matters, which were for the arbitrator to decide. *See El Dorado Sch. Dist. #15 v. Cont'l Cas. Co.*, 247 F.3d 843 (8th Cir. 2001). Additionally, because Dow Corning has not suggested that it was deprived of a fair hearing as a result of these alleged irregularities, the additional irregularities described in footnotes 4 and 16 are not grounds for vacatur.

Also, in footnote 16, Dow Corning states that "[f]or now, we will say nothing about Umpire Lyon's off-the-record conduct; however, if Safety attempts in its opposition to refer to extra-record material, we will not hesitate to catalog his off-the-record comments and behavior." Dow Mem. at 28 n.16. In the event that Dow Coming is suggesting that it is not raising the conduct described in footnote 16 as a basis for vacatur, but that it is reserving the right to do so, the court finds that grounds for vacatur must be alleged in a motion to set aside an arbitration decision. Dow Corning cannot reserve an alleged right to raise issues at a later date.

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GROUND 3:

In Ground 3, Dow Corning argues that, pursuant to § 10(a)(2) of the FAA, the arbitration award should be vacated because of Umpire Lyon's evident partiality. *See* Dow Mem. at 41. Dow Corning states that Umpire Lyon's relationship with Safety, "including his undisclosed extension of that relationship after his appointment as umpire in this arbitration, and his conduct [during] the arbitral proceeding reflect evident partiality." *Id.* at 42.

Dow Corning argues that Umpire Lyon was a "regular customer of Safety's when it comes to umpire nominees." *Id.* at 43. In support of this position, Dow Corning states that, subsequent to his nomination for the umpire in the matter under consideration, Safety nominated Lyon to serve as umpire in a similar dispute with Bristol-Myers. *See id.* In a footnote, Dow Corning acknowledges that Umpire Lyon did not serve as umpire in the Bristol-Myers matter, because Bristol-Myers exercised one of its strikes against him. *See id.* at 44, n.24. Dow Corning, however, argues that Umpire Lyon's failure to disclose his nomination in the Bristol-Myers matter establishes evident partiality. *See id.* Dow Corning suggests that Umpire Lyon's "refusal to resign at [its] request when Mr. Nelson withdrew and again after his improper ex-parte contacts cannot be attributed to proper motives." *Id.* at 46. The court finds that Umpire Lyon's refusal to capitulate to Dow Corning's request that he resign is not supportive of Dow Corning's allegation of his evident partiality.

Dow Corning also contends that Umpire Lyon's evident partiality is further established by his conduct addressed above in Grounds 1-2, including his allegedly exceeding his authority, his allegedly engaging in ex-parte communications, his allegedly biased rulings and attitude, and his exclusion of material evidence. *See* Dow Mem. at 45. As discussed above, the court has found that the conduct alleged in Grounds 1-2 does not establish grounds for vacatur.

Dow Corning further argues that Umpire Lyon's conduct establishes that he "formulated and implemented a view of the case . . . before hearing any evidence from the parties (other than his ex-parte receipt of legal argument from Safety's counsel)." *Id.* at 46. In support of this position, Dow Corning points out that in *Shook & Fletcher Insulation v Safety National Casualty Corporation*, No. 4:99MC133CEJ (E.D. Mo. filed July 8, 1999) (pending), Umpire Lyon adopted an exposure trigger while adopting a symptom-dependent trigger in this matter. *See* Dow Mem. at 46. It further suggests that Umpire Lyon's evident partiality is evidenced by the results in the *Shook & Fletcher* matter and the matter under consideration, because both matters "resulted in "Safety's apparent[] escape[] with basically no coverage obligation." *Id.*

In a letter, dated January 9, 2001, written to panel members, prior to the commencement of the hearing, Dow Corning's counsel objected to Umpire Lyon serving on the panel; reserved the right to challenge his qualifications; and stated that "this is the third arbitration in which Umpire Lyon has served as an umpire as Safety's nominee." Dow Mem., Ex 35 at ¶ 4. In a letter to Dow Corning's counsel, dated

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April 9, 2001, Umpire Lyon clarified his service on arbitration panels involving Safety as follows:

> As to my serving as umpire in other Safety National arbitrations, please be advised that in reality there was only one other. The decision in this arbitration involved two issues. There was a unanimous decision against Safety Nation[al] on the first and a split decision in favor of Safety National on the second. . . .
>
> There was one more, but the parties soon realized that the matter should not be arbitrated and settled their dispute well before any hearing took place[,] so it was[,] in effect a non-event.
>
> Though this was to be and undoubtedly will be my last arbitration for anyone, [Safety's counsel] was authorized to submit my name in a further arbitration because I had indirectly heard that both parties thereto had an interest in my services as umpire. However, another umpire was eventually selected.

Dow Mem., Ex. 47 at 3.

The FAA provides that a federal court may vacate an arbitration award where there was "evident partiality" on the part of the arbitrators. *Montez*, 260 F.3d at 982 (citing 9 U.S.C. § 10(a)(2)). The Eighth Circuit has acknowledged that "courts have had difficulty resolving the issue of what constitutes 'evident partiality' on the part of an arbitrator."

Id.[11] Justice Black, however, writing for the majority in *Commonwealth Coatings Core. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968) (*Commonwealth Coatings*), explained that arbitrators must not only be unbiased, but they must "avoid even the appearance of bias." The Eighth Circuit has noted that the concurring justices in *Commonwealth Coatings* added that an arbitrator "must disclose a business relationship if the arbitrator has a substantial interest in a firm that does more than trivial business with a party." *Olson v.* Fenner & *Smith. Inc.*, 51 F.3d 157,159 (8th Cir. 1995) (*Olson*) (citing *Commonwealth Coatings*, 393 U.S. at 151-52). In *Olson*, the Eighth Circuit concluded that the concurring justices' explanation of evident partiality presents an arguably narrower standard for evident partiality than that of the majority. *Id.* The concurring justices in *Commonwealth*

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11. In *Montez v. Prudential Securities.* Inc., 260 F.3d 980, 983(2001), the Eighth Circuit noted the definition of "evident partiality" adopted by the various circuits. *See, e.g., ANR Coal Co. v. Cogentrix of North Carolina, Inc.*, 173 F.3d 493, 500 (4th Cir. 1999) (holding that to establish evident partiality, the party seeking vacatur under § 10(a)(2) has the burden to demonstrate "that a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration"); *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998) (holding that evident partiality requires that an actual conflict exist); *Schmitz v. Zilveti*, 20 F.3d 1043, 1046 (9th Cir. 1994) (applying a "reasonable impression of partiality" standard in finding evident partiality); *Morelite Const. Corp. v. New York City Dist. Council*, 748 F.2d 79, 84 (2nd Cir 1984) (requiring more than an "appearance of bias" and holding that a "reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration"); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983) (not finding evident partiality "where arbitrator once worked under a party's principal stockholder at a different company").

Coatings, however, recognized that "arbitrators are not automatically disqualified by a business relationship with the parties before them if the parties are informed of the relationship, or if they are unaware of [the business relationship] but the relationship is trivial." *Commonwealth Coatings*. 393 U.S. at 150 (White, J., Marshall, J, concurring).

Because his nomination in the Bristol-Myers matter failed to result in an appointment, there is not reason to assume, absent evidence to the contrary, that this nomination created a conflict or a bias on Umpire Lyon's part. Because Umpire Lyon intended to retire subsequent to the arbitration in this matter, the record does not suggest that he expected any further benefit as a result of his serving as umpire in this matter. Certainly, a nomination for an arbitration panel, which nomination fails to result in appointment, is not an "ongoing business relationship," which warrants vacatur. *See*, *e.g.*, *Olson*, 51 F.3d at 158-59. A nomination without appointment is more akin to no relationship, than to a direct relationship, as alleged by Dow Corning. *See* Dow Mem. at 44.

Dow Corning argues that because Umpire Lyon was paid for his services in the matter under consideration, he had a "substantial financial interest in securing another umpire post as Safety's nominee." *Id.* at 44 n.25. For the court to accept this logic, an arbitrator could not receive compensation, or he or she could not serve more than once as an arbitrator at the behest of a party, for to do otherwise would constitute "evident partiality." The uncontroverted facts do not suggest that Umpire Lyon would personally benefit from ruling in Safety's favor; that Umpire Lyon had an improper motive; or that Umpire Lyon and Safety had a substantial ongoing

relationship which required disclosure. Therefore, the court finds that neither Umpire Lyon's prior participation in an arbitration award in which Safety prevailed, nor the favorable outcome to Safety in that arbitration decision and in the decision in the instant matter, nor Umpire Lyon's nomination in the Safety/Bristol-Myers arbitration, establishes an appearance of, or actual bias, on Umpire Lyon's part.

In a Memorandum and Order, dated March 23, 1999, the court found that "[p]aragraph eleven of the [insurance] policies [involved in this matter] merely require[s] that each party appoint an arbitrator who is an 'active or retired, disinterested official[ ] of [an] insurance or reinsurance compan[y]."[12] Doc. 25. at 5. This court further found that "[t]he arbitration provision does not provide a method by which a party may challenge the other party's choice of arbitrator." *Id.*

In its May 11, 2000, Memorandum and Order this court found that, because the insurance policies issued by Safety "do not call for a specific vetting process, technically, the parties are each free to choose the method most suitable to them." Doc. 38 at 4. The court concluded that Dow Corning

12. In its Memorandum and Order of March 23, 1999, the court addressed the issue of whether Dow Corning's reservation of rights regarding Mr. Nelson's qualifications was a refusal to arbitrate pursuant to 9 U.S.C. § 4. This court held that Dow Corning's reservation of rights did not violate the terms of the arbitrator selection process, as set forth in the insurance policies. *See* Doc. 25 at 5. This court further held that it need not determine "whether a challenge to an arbitrator's qualifications under the terms of an arbitration agreement is cognizable in a motion to vacate pursuant to § 10 of the [Act]." *Id.* at 5, n.2.

could use its vetting questionnaire to select its strikes; that Safety was free to ask the nominees only a single question; and that, after making their strikes, the parties should choose the umpire by drawing lots as agreed in the arbitration clause. *See id.* at 5.

The process for choosing an arbitration panel, as provided by the arbitration provision in the insurance policies, and as acknowledged by this court in its prior orders, assumes that, although the panel members must have certain qualifications, the parties would nominate panel members whose credentials suggest that they would be inclined to favor the nominating party. Additionally, the method of selection of the umpire, as designated by the policies, provides a means by which less desirable or theoretically unqualified, nominees can be eliminated. Because the umpire nominees are chosen by the party-appointed arbitrators, it is, likewise, inherent in this selection process that the umpire nominees will be inclined to favor the position of the nominating party-appointed arbitrator. Thus, the process for choosing the arbitration panel, as designated in the insurance policies' arbitration provision and by subsequent agreement of the parties, provides for, and presumes, an inherent degree of partiality on the part of the arbitrators, as well as the umpire.

As discussed above, courts have held that having "'chose[n] their method of dispute resolution, [the parties] can ask no more impartiality than inherent in the method they have chosen.'" *Delta Mine*, 2002 WL 1764243, at *5 (quoting *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983)). "[W]here the parties have expressly agreed to select partial party arbitrators, the award should be

confirmed unless the objecting party proves that the party arbitrator's partiality prejudicially affected the award." *Id.* Therefore, assuming, arguendo, that Umpire Lyon was partial to Safety's position, Dow Corning must establish that Umpire Lyon's alleged partiality prejudicially affected the panel's decision. Dow Corning, however, has not established that, even if Umpire Lyon were predisposed against Dow Corning's position, that this alleged partiality of Umpire Lyon prejudicially affected the panel's decision. *See Delta Mine*, *Delta Mine*, 2002 WL 1764243, at *5.

Assuming, arguendo, that Umpire Lyon's partiality is subject to the more stringent standard applicable to a neutral arbitrator, prejudice would be presumed if Umpire Lyon had failed to disclose a significant relationship. As stated above, however, Umpire Lyon did not have a significant relationship with Safety. Because Umpire Lyon had no relationship to disclose, prejudice cannot be presumed. *See id.*

Because Umpire Lyon did not have a significant relationship with Safety, because his evidentiary rulings were within his discretionary authority and did not reflect a manifest disregard of the law, and because Dow Corning has not established an appearance of, or actual bias, on the part of Umpire Lyon, the court finds that, pursuant to any of the standards articulated by federal courts, Dow Corning has failed to establish evident partiality on the part of Umpire Lyon. The court makes this finding based upon its consideration of individual acts of Umpire Lyon and upon its consideration of the cumulative effect of his conduct and rulings. Therefore, the court finds that Dow Corning has failed to establish evident partiality pursuant to § 10(a)(2) of the FAA.

Appendix B

GROUND 4(a):

In Ground 4(a), Dow Corning argues that the arbitration decision reflects an arbitrary and wholly irrational departure from, and manifest disregard of, governing law. Dow Corning argues that the arbitration panel "identified the law, but then 'proceeded to reach a contrary position in spite of it,'" as evidenced by its choosing to apply an "injury in fact" trigger of coverage, rather than a "manifestation trigger." *See* Dow Mem. at 47-8. Dow Corning further contends that the panel's decision "shied away from 'manifestation' (by name) because it is so widely rejected by courts and insurers alike." *Id.* Rather, Dow Corning suggests that the panel's decision "attempted instead to read a manifestation requirement into the 'injury-in-fact' trigger," even though "'the injury-in-fact' trigger and the 'manifestation' trigger are two different tests." *Id.* at 49. Dow Corning cites treatise and case law authority for its position. *See id.*

The arbitration decision in the matter under consideration concluded that the "trigger of coverage" was "injury in fact." Dow Corning, however, states that, "[r]ather than openly adopt a 'manifestation' trigger, the 2-to-1 majority instead picked 'injury in fact' and followed Safety's gambit of twisting it into manifestation." Dow Mem at 48. Dow Corning further suggests that the majority's disregard for the law is manifested in its "rejection of the trigger test that was actually promulgated by the arbitrators," and that the panel's decision recognized the law applicable to the issue before it, yet disregarded it. *See id.*

Appendix B

Dow Corning also contends that the arbitration panel's decision demonstrates a manifest disregard for the law by holding that "the 'injury-in-fact' trigger requires Dow Corning to establish that each tort claimant's symptoms are 'causally related' to her implants." *Id.* Dow Corning argues that it is "black-letter law that an insurer cannot relitigate the facts of a tort claim that has already been resolved." *Id.* Because it has settled all breast implant cases against it by paying several billion dollars, Dow Corning argues that the arbitrator's decision is tantamount to denying Dow Corning any coverage at all.

Significantly, Dow Corning admits that its legal theory of when injury occurs in not the only one.[13] Dow Corning states that, "in the context of latent bodily injury and disease caused by an injurious substance, the courts have not always agreed on when injury 'occurs.' They have taken at least four different approaches to this issue: (1) the 'exposure' rule;

13. During the course of this litigation, a representative of Dow Corning testified that "in early 1992, when the breast implant situation began, . . . [Dow Corning] revise[d] the way that [it was] doing notices to the insurance carriers and [it] began sending notice to all [its] insurance carriers over a 30-year period of time going back to 1960." Safety Mem., Ex. 8 at 3607-08. The reason for this was that "there were some aspects of the claims that [Dow Corning was] getting at the time that it was difficult to determine what policy period [was] applicable." *Id.* at 3308. The Dow Corning representative further testified that "in order to make sure that everyone was being notified, [Dow Corning] sent [notices] to all of [its] carriers." *Id.* The Dow Corning representative also testified that, subsequent to the filing of the lawsuit, regarding "what date of loss theory had been adopted by Dow Corning . . . as of July 1993, nothing had been determined." *Id.*, Ex. 8 at 3757. This testimony suggests that Dow Corning initially was uncertain of what theory of "trigger of coverage" was applicable to the Safety policies.

(2) the 'manifestation' rule; (3) the 'continuous' rule; and (4) the 'injury-in-fact rule.'" Dow Mem. at 4. Dow Corning further states that "[u]nder the 'manifestation' trigger, only a single policy is triggered -- the one on the risk when the symptoms emerge or the bodily injury becomes manifest," and that this rule defeats coverage under the Safety policy. *Id.* at 4-5. Dow Corning further states that the "exposure," "continuous," and "injury-in-fact" triggers would afford coverage. *See id.* at 5.

"'Beyond the grounds for vacation provided in the FAA, an [arbitration] award will only be set aside where it is completely irrational or evidences a manifest disregard for the law.'" *Hoffman*, 236 F.3d at 461 (citations omitted). An arbitration decision disregards the law "'where the arbitrators clearly identify the applicable governing law and then proceed to ignore it.'" *Id.* at 462 (citing *Stroh*, 783 F.2d at 751). Moreover, a court's disagreement with an arbitrator's interpretation of the law is insufficient basis for setting aside the award. *See El Dorado*, 247 F.3d at 846 (citing *Hoffman*, 236 F.3d at 462).

The arbitration decision in this matter did not articulate why the panel chose to apply the law as it did. Arbitrators, however, need not provide reasons supporting their decision. *See El Dorado*, 247 F.3d at 848 (citing *Stroh*, 783 F.2d at 750). Additionally, the court notes that Dow Corning's arguments address the semantics of the decision. Yet, it is the decision's legal conclusion which is subject to the scrutiny for its alleged disregard of the law. The arbitration decision's legal conclusion was that Dow Corning was required to prove that injury occurred during the policy year. The decision also

defined what proof is sufficient to establish that injury occurred during the policy year. Because the arbitration decision's ultimate finding reflects the legal theory which the panel found applicable to the matter before it, the court finds that the decision does not identify applicable law and then ignore it.

Dow Corning suggests that the arbitration decision reflects the panel's misunderstanding and misapplication of the law. Even if this court were to conclude that the arbitration decision incorrectly interpreted the law, or if this court were to disagree with the panel's identification and application of the law, it cannot be said that the arbitration decision disregarded the law. *See Bobker*, 848 F.2d at 933. A manifest disregard means "more than error or misunderstanding with respect to the law." *Id.* The court finds that the panel majority's decision suggests that its authors identified what they believed was the applicable law, and attempted to follow that law. *See Hoffman*, 236 F.3d at 462. Under such circumstances, the court concludes that the arbitration decision does not reflect a manifest disregard of the law.

GROUND 4(b):

In Ground 4(b) Dow Corning argues that the majority decision reflected an arbitrary and wholly irrational departure from the terms of the insurance policies at issue. Dow Corning argues that the arbitrators "rewrote the Safety policies [and that] [a]s a result, the arbitrators' decision is 'completely irrational' in that it does not draw its essence from the terms of the insurance policies." Dow Mem. at 51.

In particular, Dow Corning suggests that there is no "rational explanation" for the panel's conclusion that "Safety policies do not provide coverage for Dow Corning's 'generic' breast implant defense costs." *Id.* Dow Corning states that the polices do provide coverage for any cost that qualifies as a defense cost. *See id.* It does not cite specific policy provisions in support of this provision.

The arbitration decision does state that "Safety National is not required under the terms of these three policies to indemnify Dow Corning for its 'Generic Expenses.'" *Id.*, Ex. 4 at ¶ 4. In its Response, Safety explains that "generic costs" are those related to the defense of claims. *See* Doc. 56 at 49. It further suggests that, according to insurance law, an excess carrier does not owe a duty of defense "until all underlying coverage has been exhausted by payment of claims." *Id.* (citing *Fireman's Fund Ins. Co. v. TIG Ins. Co.*, 14 S.W.3d 230, 232 (Mo. App. 2000) *(Fireman's Fund)*).

As discussed above, an arbitration decision will not be set aside, other than on the grounds provided by the FAA, unless it is "completely irrational or evidences a manifest disregard for the law." *Hoffman*, 236 F.3d at 461. An arbitration decision is irrational only "where it fails to draw its essence from the agreement." *Id.* at 462 (citations omitted). The United States Supreme Court has stated that "[c]ourts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision . . . misinterprets the parties' agreement." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (*Garvey*) (citing *Paperworkers v. Misco. Inc.*, 484 U.S. 29, 36 (1987) (*Misco*)). It further stated that if an "'arbitrator is

even arguably construing [a] contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'" *Id.* (citing *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000)). Thus, the Court found that an arbitrator's "'improvident, even silly, fact finding' does not provide a basis for a reviewing court to refuse to enforce the award" *Id.* (quoting *Misco*, 484 U.S. at 39).

Because Safety's policies do not include a provision which clearly requires Safety to indemnify for generic expenses, the undersigned finds that the arbitration decision's conclusion to the contrary is not irrational nor does it manifest the irrationality of the entire decision. Moreover, *Fireman's Fund* does hold that "[i]f there is not language [in an insurance contract] requiring the insurer to defend, there is no duty to defend. (citation omitted) . . . Generally, an excess insurer is not obligated to contribute to defense costs, or undertake a defense, until primary liability limits are exhausted:" 14 S.W.3d at 232.

The arbitration decision, in this matter, refers to custom and usage in the insurance industry, as required by Safety's policies. Because these policies are susceptible to the interpretation given them by the arbitration decision and because the arbitrators sought to apply the policy language to the facts before them, the court concludes that the arbitration decision draws its essence from the policies. *See Osceola County Rural Water Sys. v. Subsurfco, Inc.*, 914 F.2d 1072, 1075 (8th Cir. 1990). That this court or any other court might have interpreted the policies differently does not justify finding that the arbitration decision should be vacated

because "[i]t is the arbitrator's construction and application of the contract for which the parties bargained." *Id.* "[T]he arbitrators [in this matter] brought their collective experience to bear on the extensive testimony . . . and then entered an award in accordance with their understanding of the meaning of the contract provisions" as applied to the facts and law before them. *See id.* The court, therefore, concludes the arbitration decision was not irrational, and that vacatur is not appropriate based on the panel's interpretation of the insurance policies, of the facts, of applicable law, or of custom and usage in the insurance industry.

EXHIBITS UNDER SEAL

Safety requests that its Exhibits 10, 12, 13, 14, 20, 24, 25, 27, and 29 be filed under seal. *See* Doc. 53; Doc. 59. Safety's Exhibit 14 is a "Prospective Umpire Questionnaire," completed by Umpire Lyon and which addresses possible conflicts of interest. Attached to the completed questionnaire, is Umpire Lyon's resume. Because the information included in the questionnaire and Umpire Lyon's resume is relevant to Dow Corning's allegation that vacatur is appropriate based on Umpire Lyon's partiality, the court denies Safety's request to file Exhibit 14 under seal. The court will grant Safety's motion to file Exhibits 10, 12, 13, 20, 24, 25, 27, and 29 under seal.

Safety and Dow Corning jointly request that the transcript of the arbitration hearing be filed under seal and that they be given the opportunity to file a redacted transcript. In this Memorandum and Order, the court references testimony given and statements made during the course of the hearing.

The parties have not requested, nor will the court file this Memorandum and Order under seal. The court will grant the motion that the actual transcript of the proceedings be filed under seal, with the exception that references in this Memorandum and Order to the transcript are subject to publication of this Memorandum and Order. The court grants the parties the opportunity to file a redacted transcript, which shall not be filed under seal.

CONCLUSION

For the reasons stated above, the court finds that, because the affidavits of Judge William H. Webster and Kenneth S. Abraham suggest applicable legal theory and suggest conclusions of law, these affidavits are not properly before this court. The court further finds that Dow Corning has failed to present a basis upon which the court should grant vacatur of the arbitration decision. The court also finds that, in accordance with this Memorandum and Order, Safety's Exhibits 10, 12, 13, 20, 24, 25, 27, and 29 and the transcript of the arbitration hearing shall be filed under seal until February 1, 2004.

Accordingly,

IT IS HEREBY ORDERED that Safety National Casualty Corporation's Motion to Strike the Affidavits Filed in Support of Dow Corning's Motion to Vacate (Doc. 54) is **GRANTED** in part and **DENIED** in part; the court strikes those portions of the affidavits which include legal and factual conclusions;

IT IS FURTHER ORDERED that Dow Corning's Motion to Vacate Arbitration Decision (Doc. 40) is **DENIED**;

IT IS FURTHER ORDERED that Safety National Casualty's Motion to File Under Seal (Doc. 53) is **GRANTED** in part and **DENIED** in part; Exhibits 10, 12, 13, 20, 24, 25, 27, and 29 and the transcript of the arbitration hearing shall be filed under seal until February 1, 2004; citations from, and references to, the arbitration transcript in this Memorandum and Order are not subject to the seal; the parties may file a redacted version of the transcript at any time prior to February 1, 2004, which redacted transcript shall not be under seal.

Dated this 18th day of March 2002.

s/ Jean C. Hamilton
Jean C. Hamilton
United States District Judge

APPENDIX C — ARBITRATION DECISIONS

CONFIDENTIAL

DOW CORNING CORPORATION

versus

SAFETY NATIONAL CASUALTY CORPORATION

ARBITRATION AS RESPECTS SAFETY NATIONAL'S POLICIES NUMBERS UF1332MI, UF1333MI, & UF1335MI

ARBITRATION DECISIONS

Having reviewed two sets of pre-hearing briefs from each party, having heard extensive argument and evidence at a hearing held in Old Greenwich, Connecticut from July 23 to July 27, 2001, and having considered the law and the custom and usage of the insurance and reinsurance business, the majority of this board of arbitration, John P. Hyland, Arbitrator and James A. Lyon, Umpire have decided as follows:

1. These decisions are binding as to both parties.

2. In consideration of the policy wordings and the custom and usage of the insurance and reinsurance business, the "Trigger of Coverage" is "Injury In Fact" which shall be interpreted as an actual personal injury which:

    a. First occurs during the December 1, 1983 to December 1, 1984 period of these policies.

b. Is causally related to a Dow Corning implant.

c. Is supported by documented medical evidence that such initial injury occurred during this policy period and that a related medical examination and/or treatment occurred during this policy period or reasonably soon thereafter.

3. Safety National is required to indemnify Dow Corning for Safety National's pro rata share of each individual loss payment and related allocated loss adjustment expense under these three policies only to the extent that an actual claim payment is made to an identifiable third party claimant who sustained an injury in fact during the period of these policies. However, Safety National is not required to indemnify Dow Corning until coverage under all applicable underlying policies during the period of these three policies are exhausted by such related allocated loss adjustment expenses and indemnity payments to third parties. As respects such underlying coverage, Dow Corning shall assume responsibility for all deductibles, self insurance, coverage gaps, unrecoverables caused by insolvencies, captive reinsurance, and deficiencies caused by settlements for less than full limits with other insurers or reinsurers.

4. Safety National is not required under the terms of these three policies to indemnify Dow Corning for its "Generic Expenses".

Appendix C

5. Safety National's coverage defenses of late notice and material misrepresentation are disallowed and there is not sufficient evidence for a finding of "bad faith" against either Dow Corning or Safety National. Therefore, penalties such as extracontractual damages or interest related to loss payments are not awarded.

6. Dow Corning and Safety National are to be responsible for their own costs of this arbitration except those of the umpire which are to be shared equally.

on August 7, 2001 at Greenwich, Connecticut

s/ John P. Hyland
John P. Hyland, Arbitrator

on August 7, 2001 at La Canada, California,

s/ James A. Lyon
James A. Lyon, Umpire

Appendix C

Dow vs Safety — Minority Opinion

I concur with paragraphs 1, 5 and 6 of the majority's decision.

I dissent vigorously from the rest.

Paragraph 2 (a) is all right because that means that injury happened at date of implant.

Paragraph 2 (b) is bizarre. Everybody at this hearing agrees that there is probably no causal connection between an implant and disease. This paragraph effectively denies Dow any coverage for billions it will pay for injuries alleged by claimants.

Paragraph 2 (c) just compounds this felony by requiring documented medical evidence, examination or treatment. The insurance policies make no such requirement. In most cases, by number if not by dollar amount, there won't be any such documentation. This requirement puts both parties into a fact gathering expedition likely to cost more than the dollars at stake between them.

Paragraph 3, other than being verbose and hard to understand, is not particulary objectionable, except to the extent it appears to rule out payments into the qualified settlement trust as covered.

Paragraph 4 is simply inexplicable.

Appendix C

I hope that Safety and Dow can reach an agreement between them which will overcome the difficulties imposed by the majority decision.

s/ Benjamin R. Schenck
Benjamin R. Schenck, Arbitrator

APPENDIX D — CONSENT ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION FILED JULY 15, 1999

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

CASE NO. 95-20512 AJS

CHAPTER 11

HONORABLE ARTHUR J. SPECTOR

OBJECTION DOCKET # 97-0002

IN RE:

DOW CORNING CORPORATION,

DEBTOR.

CONSENT ORDER RESOLVING DEBTOR'S OMNIBUS CLAIM OBJECTION NO. 46 IN OBJECTION DOCKET # 97.0002 AS TO SAFETY NATIONAL INSURANCE COMPANY

DOW CORNING CORPORATION (the "Debtor") having filed its Omnibus Objection No. 46 in Objection Docket # 97-0002 (the "Objection") as to various claims asserted or potentially assertable by Non-Settling Insurers, including the claims, if any, held by Safety National Insurance Company f/k/a Safety Mutual Insurance Company ("Safety

National"); and the Debtor and Safety National having resolved such matters, as evidenced by the signatures of their counsel below,

THE COURT THEREFORE ORDERS AS FOLLOWS:

1. Except as expressly provided herein, nothing herein shall be deemed to adjudicate, alter or in any manner impair any claim, right or defense of any party with respect to any matter. Capitalized terms not defined herein shall have the definitions ascribed in the Joint Plan.

2. Nothing in the Joint Plan, any order of confirmation as to the Joint Plan or any amendment thereof, or in this or any prior order of this Court in the bankruptcy case, including any prior order approving any settlement between the Debtor and any other insurance carrier, shall, or shall be deemed to:

A. Release any alleged claim that Safety National may have against any other insurance carrier providing product liability coverage to the Debtor; or

B. Channel, enjoin, or otherwise restrict or impair the rights, if any, of Safety National under applicable non-bankruptcy law to pursue any right or remedy, in any available forum, against any ocher insurance carrier.

3. Matters and issues with respect to the alleged liability of Safety National to Dow Corning, its successors and assigns under any Insurance Policy will be fully and finally adjudicated (i) in the existing arbitration action

(the "Arbitration") in accordance with any orders previously entered by the Bankruptcy Court in this case related to the Arbitration, and/or (ii) in subsequent actions in the appropriate forum addressing matters of such insurance coverage and liability not resolved in such Arbitration and/or addressing enforcement thereof (collectively, the "Insurance Litigation").

4. If and to the extent that (i) Safety National may hereafter pay amounts to the Debtor, the Settlement Facility and/or the Litigation Facility with respect to such Insurance Policies and (ii) subsequent Final Orders in Insurance litigation shall determine that the Debtor is liable to Safety National under any theory for return of a portion of the amount Safety National hereafter tendered to the Debtor, the Litigation Facility, or the Settlement Facility, as applicable (the "Future Reimbursement Claim"), then in such event Safety National may pursue recovery of such Future Reimbursement Claim from the Debtor, or from the Litigation Facility or the Settlement Facility, to the extent such funds have been paid into such facility.

5. Safety National stipulates and agrees that it does not have, and upon any subsequent tender of payment under an Insurance Policy will not have, any interest in, or any claim of security interest, lien, charge, or priority in or to, any of the Insurance Policies or any proceeds therefrom (including escrowed settlement proceeds) now or hereafter payable to the Debtor, the Settlement Facility and/or the Litigation Facility. Notwithstanding the foregoing, if, when and to the extent that Safety National obtains a determination that it holds a valid Future Reimbursement Claim, such Future

Reimbursement Claim Safety National may have (as contemplated in Paragraph 4 above) shall be payable as a general unsecured, non-priority claim from the Debtor, or from the Litigation Facility or the Settlement Facility, to the extent such funds have been paid into such facility.

6. In the event that any funds are actually required to be reimbursed to Safety National under paragraphs 4 or 5 above, any previous payment of such funds into the Litigation and/or Settlement Facility shall not be counted toward the Debtor's funding obligation(s) under the Joint Plan to the extent of any actual reimbursement, and the Debtor shall promptly pay into the Litigation Facility or Settlement Facility such amount as is required to timely comply with such funding obligations.

7. The parties agree that the legal effect of confirmation of the Joint Plan as a settlement or judgment (i.e., a loss under the policies pursuant to the *UNR* case) is a matter of law for future adjudication that is neither addressed nor resolved by this Consent Order, and Dow Corning and Safety National have agreed to disagree concerning the application, if any, of the *UNR* doctrine in this case.

8. Safety National did not file any objections to confirmation of the Joint Plan, and Safety National has not filed any objection to the use and distribution of the settlement proceeds received from the Settling Insurers as contemplated by the Joint Plan.

9. Safety National represents and warrants that it did not file any Proof of Claim in this case.

10. Claim Objection No. 46 is hereby withdrawn as moot with respect to Safety National.

11. Safety Nationals' Response to Claim Objection No. 46 and Motion to Dismiss Adversary Proceeding Pursuant to FRCP 12(b)(6) or Alternatively to Abstain Pursuant to 28 U.S.C. § 1334 and related requests are hereby withdrawn as moot

SO ORDERED,

s/ Arthur J. Spector
UNITED STATES BANKRUPTCY JUDGE
7/15/99

Stipulated and agreed as to form and substance

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APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING DATED AUGUST 28, 2003

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

August 28, 2003

No. 02-2048

In Re: Arbitration Between Dow Corning Corporation,

Appellant,

vs.

Safety National Casualty Corporation,

Appellee.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX F — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN *SHOOK & FLETCHER ASBESTOS SETTLEMENT TRUST v. SAFETY NATIONAL CASUALTY CORPORATION* FILED OCTOBER 21, 2003

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 03-1092

Shook & Fletcher Asbestos Settlement Trust,

Plaintiff - Appellee,

v.

Safety National Casualty Corporation,

Defendant - Appellant.

Submitted: July 22, 2003

Decided: October 21, 2003

Appeal from the United States District Court for the Eastern District of Missouri.

Before LOKEN, Chief Judge, FAGG and MORRIS SHEPPARD ARNOLD, Circuit Judges.

Appendix F

PER CURIAM.

A flood of asbestos-related damage claims against Shook and Fletcher Insulation Co., an insulation contractor, led to coverage disputes between Shook and Fletcher and its many liability insurers. In November 1997, an Alabama state court ordered the parties to arbitrate this dispute, which involves an excess umbrella policy issued to Shook and Fletcher by Safety National Casualty Corporation. The arbitration panel issued a decision in favor of Safety National and declared its award to be binding. Shook and Fletcher moved to vacate the award under section 10 of the Federal Arbitration Act, 9 U.S.C. § 10, arguing that the panel exceeded its authority in declaring its decision to be binding. The district court[1] agreed that the arbitration is non-binding and vacated that portion of the award. Safety National appeals, arguing the issue was a procedural matter for the arbitrators to decide, and their decision must be upheld under the deferential standard of review mandated by the Federal Arbitration Act.

In *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003), we considered the same arbitration clause in Safety National policies issued to another insured. We concluded that the issue whether the parties contracted for binding or non-binding arbitration went to the scope of the arbitrators' authority and was therefore beyond their authority to resolve. We further concluded that the clause in the Safety National policy was ambiguously silent on this issue. Lacking extrinsic evidence in the record, such as evidence of custom and usage, we held that the policies

1. The HONORABLE CAROL E. JACKSON, Chief Judge of the United States District Court for the Eastern District of Missouri.

provided for mandatory but non-binding arbitration. Accordingly, we vacated the arbitrators' declaration to the contrary.

This case presents the same issues we decided in *Dow Corning*. Once again, the record contains no extrinsic evidence relevant to construing the ambiguous arbitration provision. Therefore, *Dow Corning* is controlling. As the district court's decision is consistent with our later decision in *Dow Corning*, we affirm.

Supreme Court, U.S.
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(2)

No. 03-790

IN THE

Supreme Court of the United States

SAFETY NATIONAL CASUALTY CORPORATION,

Petitioner,

v.

DOW CORNING CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals, in accord with every other court of appeals to have decided the issue, correctly held that an agreement providing for non-binding arbitration is enforceable.

2. Whether the parties intended a court, rather than the arbitrators, to decide whether the arbitration decision in this case is binding or non-binding.

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are named in the caption. The following publicly held companies own 10 percent or more of Dow Corning Corporation's stock: Dow Chemical Company and Corning, Inc.

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STATEMENT OF THE CASE

This case concerns an arbitration clause in insurance policies issued two decades ago by Petitioner Safety National Casualty Corporation ("Safety") to Respondent Dow Corning Corporation ("Dow Corning"). Dow Corning seeks $9.15 million in coverage under the policies for a portion of its massive breast-implant liabilities. Reserving its right under the arbitration clause to pursue the claim in litigation, Dow Corning first submitted the matter to arbitration, where a split panel found against Dow Corning. The court of appeals correctly determined that the policies' arbitration clause provides for non-binding arbitration and that Dow Corning is now entitled to pursue its coverage claim in court.

1. The Arbitration Agreement. The arbitration clause included in the boilerplate of Safety's insurance policies for 1983-84 provides that the parties will proceed with arbitration "[a]s a condition precedent to any right of action under this Policy." Resp. App. 1a.[1] In addition to this affirmative recognition that post-arbitration litigation is permitted, the clause lacks any indication of arbitral finality. Notably, the arbitration clause does not: (i) state that the arbitrators' decision will be "final" or "binding"; (ii) incorporate by reference arbitration rules, such as the rules of the American Arbitration Association, that deem any arbitral award made under the rules to be binding; or (iii) provide for judicial enforcement of any arbitral award. Each of these three mechanisms is used in arbitration agreements to indicate that the parties intend the results of their arbitration to be binding.

2. The Arbitration Proceedings. On June 30, 1998, Dow Corning initiated proceedings against Safety

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[1] The Safety arbitration clause is reproduced in the Appendix to this brief.

pursuant to the arbitration agreement. Before a tribunal was empaneled, Dow Corning expressly reserved its rights to contest whether any arbitral decision would be binding and to litigate its coverage claim in court upon completion of the arbitration. *See* Pet. App. 7a-8a; C.A. App. 275-76, 318-19. Once the panel was in place, Safety attempted to submit the binding/non-binding issue to the arbitrators. Specifically, Safety asked the panel to rule that it had authority to decide whether its decision would be binding, and that its decision would in fact be binding on the parties. *See* C.A. App. 196-203. Over Dow Corning's opposition, the panel declared its "intent that its decisions . . . be deemed as binding upon the parties." C.A. App. 221.[2]

The final arbitration hearing took place in July 2001. The following month, the panel announced a 2-to-1 decision in Safety's favor. Pet. App. 86a-88a. The majority decision was issued by umpire James Lyon, who had been nominated by Safety (in three other coverage arbitrations as well as this one) and appointed by the functional equivalent of a "coin flip." *Id.*; *see also* Pet. App. 11a, 14a. Mr. Lyon, joined by Safety's party-appointed arbitrator, denied Dow Corning's $9.15 million coverage claim in its entirety, relying on an

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[2] Dow Corning opposed Safety's motion on the ground that the panel had no power to decide the binding/non-binding issue. *See* C.A. App. 205-17. Dow Corning expressly declined to brief the merits of the binding/non-binding issue to the arbitrators lest it risk a waiver of its argument that the issue was for a court to decide. *See id.* at 215.

The parties' disagreement over whether the arbitration would be binding was later reflected in a bankruptcy court stipulated consent order. *See* Pet. App. 7a-8a. Relying on incomplete quotations from this consent order, Safety argued below that the parties had agreed to submit to binding arbitration, altering the terms of their original agreement. The court of appeals read the relevant provision in full and correctly concluded that the consent order simply "preserved the parties' conflicting positions on this issue." *Id.* at 8a; *see also* Pet. App. 92a-93a.

interpretation of the "trigger of coverage" issue that departed from the breast implant judicial decisions, which uniformly recognize that policies in effect at the time of implantation are triggered. *Compare* Pet. App. 86a-87a *with, e.g., In re Silicone Implant Ins. Litig.*, 667 N.W.2d 405, 416-17 (Minn. 2003); *Dow Corning Corp. v. Continental Cas. Co.*, Nos. 200143-154, 1999 WL 33435067, at *6 (Mich. Ct. App. Oct. 12, 1999); *Bristol-Myers Squibb Co. v. AIU Ins. Co.*, No. A-145,672, slip op. at 7 (Jefferson Cty. Tex. Dist. Ct. May 3, 1996) (C.A. App. 145-49). The third arbitrator, who once served as New York's Superintendent of Insurance, "dissent[ed] vigorously" from the majority's take-nothing decision, describing the majority's trigger ruling as "bizarre" and contrary to the terms of the Safety policies. Pet. App. 89a-90a; C.A. App. 154.

3. Proceedings in the District Court. On October 31, 2001, Dow Corning filed a motion in the United States District Court for the Eastern District of Missouri to vacate the arbitration decision pursuant to Section 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10. Of importance to the present petition, Dow Corning challenged the arbitration decision on the ground that the arbitrators had exceeded their powers by deciding the binding/non-binding issue and by purporting to issue a binding award.

The district court agreed with Dow Corning that the binding/non-binding issue should be decided independently by the court. Pet. App. 38a. Without hearing oral argument, and relying on agreements made subsequent to the original arbitration clause, the district court concluded that the parties intended the arbitrators' decision to be binding. Pet. App. 37a-41a. The district court therefore denied Dow Corning's motion to vacate and dismissed the action. Pet. App. 85a.

4. The Court of Appeals' Decision. On appeal to the United States Court of Appeals for the Eighth Circuit, Dow Corning challenged the district court's determination

that the arbitration decision was binding on the parties. In its brief to the court of appeals and at oral argument, Safety did not challenge the district court's ruling that the binding/non-binding question was for the court to decide. The first time Safety raised the issue was months after oral argument in a Fed. R. App. P. 28(j) letter to the court. *See* Letter from Counsel for Safety to Michael E. Gans, Clerk of Court (June 27, 2003); Letter from Counsel for Dow Corning to Michael E. Gans, Clerk of Court (July 1, 2003).

In a unanimous decision written by Chief Judge Loken, the court of appeals modified the district court's order to reflect that "the excess liability policies provided for mandatory but non-binding arbitration." Pet. App. 6a. Analyzing the terms of the arbitration agreement, the court of appeals determined that "the parties contracted for non-binding arbitration," and that such contracts for mandatory, non-binding arbitration are enforceable under the FAA. Pet. App. 8a-10a. The court of appeals agreed with the district court that the arbitrators "doubtless exceeded their authority in declaring their decision to be binding," as this presented a question for the court. Pet. App. 8a.

Thereafter, the court of appeals denied Safety's petition for panel rehearing or rehearing *en banc*. Pet. App. 96a.[3]

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[3] Safety's petition for certiorari refers several times to *Shook & Fletcher Asbestos Settlement Trust v. Safety National Casualty Corp.*, No. 03-1092, 2003 WL 22391526, at *1 (8th Cir. Oct. 21, 2003) (Pet. App. 97a-99a), which was decided by the court of appeals shortly after it decided the instant case. *Shook & Fletcher* involved the same arbitration clause at issue here. As in the instant case, Safety secured an arbitration award from a divided panel, with Safety-nominated umpire Mr. Lyon again casting the tiebreaking vote in Safety's favor. *See* C.A. App. 181-82. Over the policyholder's objection, the arbitration panel held that its award was binding. On Shook & Fletcher's motion to vacate, the district court concluded that the arbitrators had exceeded their powers in reaching the binding/non-binding issue, and that the (continued...)

REASONS FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT PROPERLY ENFORCED THE PARTIES' AGREEMENT TO ENGAGE IN NON-BINDING ARBITRATION.

Safety asks the Court to grant its petition in order to hold that "There Is No Such Thing As Non-Binding Arbitration." Pet. 4. There is no basis for this request. The court of appeals' determination that parties may contract for mandatory but non-binding arbitration does not conflict with any decision of another court of appeals, and is strongly supported by decisions of this Court recognizing that the primary purpose of the FAA is to enforce the intentions of the parties as expressed in their arbitration agreement. Moreover, non-binding arbitration is a valid and recognized form of arbitration, and Safety is plainly wrong to deny its existence.

A. The Courts of Appeals Unanimously Agree That Parties To An Arbitration Agreement May Contract For Non-Binding Arbitration.

Safety has not cited a single circuit court decision refusing to enforce a contract for non-binding arbitration. Consistent with the decisions of the Eighth Circuit here and in *Shook & Fletcher*, every court of appeals to decide the issue has held that agreements to engage in mandatory, non-binding arbitration are valid and enforceable. In *United States v. Bankers Insurance Co.*, 245 F.3d 315 (4th Cir. 2001), the Fourth Circuit rejected the argument that an

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arbitration clause in Safety's policies provided for mandatory, non-binding arbitration. Pet. App. 98a. Citing its earlier decision in *Dow Corning*, the Eighth Circuit affirmed, *id.* at 98a-99a, and subsequently denied Safety's petition for panel rehearing and rehearing *en banc* on November 24, 2003.

agreement for non-binding arbitration is unenforceable, noting that "[m]andatory arbitration, as a prerequisite to initiation of litigation, and binding arbitration, where the parties must accept an award or decision of the arbitrator, are two different things." *Id.* at 321-22. In *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1209 (9th Cir. 1998), the Ninth Circuit held that "arbitration need not be binding in order to fall within the scope of the Federal Arbitration Act. The FAA is no less applicable to [an agreement for non-binding arbitration] than it would be if the parties had agreed to submit to binding arbitration." In addition, the Third Circuit has upheld non-binding arbitration in the collective bargaining context. *See Orlando v. Interstate Container Corp.*, 100 F.3d 296, 300 (3d Cir. 1996). In language that directly supports the Eighth Circuit's approach, the Third Circuit in *Orlando* held that "[t]he omission of any indication that arbitration proceedings should be final and binding leads us to conclude that, if we nevertheless declared them to be so, we would not be enforcing the will of the parties, as expressed in their agreement." *Id.* at 301.

These judicial decisions – including decisions involving insurance-related arbitrations[4] – refute Safety's assertion that there is no such thing as non-binding arbitration. While it may be true that in "most" cases, "private agreements to arbitrate involve binding arbitration," Pet. 8 (quoting American Arbitration Ass'n, *Insurance ADR Manual*, § 4.03 at 57 (1993)), "most" is not "all," and "all" is the position Safety advances here. It simply does not follow

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[4] Safety's assertion that the court of appeals' decision in this case carves out an "insurance exception" to an otherwise applicable requirement of binding arbitration is incorrect. *See* Pet. 4. Like the Fourth Circuit in *Bankers*, the Eighth Circuit in this case and in *Shook & Fletcher* has placed insurance-related arbitration agreements on exactly the same footing as other arbitration agreements, by enforcing them according to their terms.

that private agreements to arbitrate *must* involve binding arbitration, and neither this Court nor any court of appeals has so held. To the contrary, courts have concluded that parties may contract for non-binding arbitration if they so choose.[5]

Other authorities, including prior decisions of this Court, confirm that non-binding arbitration not only exists, but is a widely recognized and valid form of arbitration. In *Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Court recognized the desirability of an arbitral procedure that "would not receive preclusive effect in any subsequent"

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[5] Safety cites the Ohio Supreme Court's non-majority opinion (without identifying it as such) in *Schaefer v. Allstate Insurance Co.*, 590 N.E.2d 1242 (Ohio 1992), for the observation that "'[n]on-binding arbitration' is a contradiction in terms." Pet. 7 (citing *Schaefer*, 590 N.E.2d at 1245 (op. of Douglas, Sweeney and Resnick, JJ.)). *Schaefer* involved application of Ohio's arbitration statute, not the FAA, to an arbitration clause in an uninsured motorists policy that rendered awards above a certain threshold amount subject to trial de novo in court. *See* 590 N.E.2d at 1249 n.9 (op. of Douglas, Sweeney, and Resnick, JJ.). Three justices thought the clause was unenforceable because it prescribed a form of non-binding arbitration, *see id.* at 1244-50 (op. of Douglas, Sweeney, and Resnick, JJ.); three other justices thought the clause was unenforceable because it unfairly permitted trials de novo only for the benefit of the insurer, *see id.* at 1250-53 (op. of Wright, J., Moyer, C.J., and Brown, J., concurring in the judgment only); a seventh justice (Holmes, J.) dissented from the unenforceablity holding of the other six. Thus, only three of seven justices embraced the observation cited by Safety. The other grouping of three justices noted that the issue had not been briefed and stated that their brethren's views "will . . . be news to the parties in these cases, the trial courts and the courts of appeals below (not to mention the whole of the Ohio judiciary)" and "will no doubt come as a surprise to the General Assembly, which has used one or both of the terms 'binding' and 'non-binding' to modify arbitration in no fewer than ten sections of the Ohio Revised Code." *Id.* at 1250 (op. of Wright, J., Moyer, C.J., and Brown, J., concurring in judgment only). In any event, Ohio follows the "syllabus rule," and the propositions cited by Safety do not appear in any Ohio case syllabus. *See* Ohio Sup. Ct. R. Rpt. 1(B).

judicial action. *Id.* at 308 n.21. More recently, in *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998), the Court considered whether a "nonbinding" arbitration procedure had to be exhausted as a predicate to judicial action. *Id.* at 878-79 & n.5. Neither the majority nor the dissenting opinion suggested that an agreement to engage in non-binding arbitration would be unenforceable or that non-binding arbitration was a contradiction in terms. *Id.*; *see id.* at 881 (Breyer, J., dissenting); *see also Bartnicki v. Vopper*, 532 U.S. 514, 519 (2001) (referring to a "nonbinding arbitration proposal"); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 827 (1999) (describing "mediation, arbitration, and a settlement conference" as a prelude to litigation); *id.* at 870 (Breyer, J., dissenting) (noting that global settlement of asbestos-related litigation provided for "mediation and nonbinding arbitration").

In addition, non-binding arbitration is a mainstay of the federal court-annexed alternative dispute resolution program established by Congress and codified at 28 U.S.C. §§ 654-657. Under this program, a district court, with the parties' consent, may refer a civil action to "arbitration." *Id.* § 654(a). Within 30 days after the resulting arbitral award, "any party may file a written demand for *a trial de novo in the district court*," upon which "the action shall be restored to the docket of the court and treated for all purposes as if it had not been referred to arbitration." *Id.* § 657(c) (emphasis added). As the Federal Judicial Center has explained, "[u]nlike mediation, arbitration is an adjudicatory, rights-based process. In federal court-based arbitration, one or three arbitrators hear adversarial presentations, usually in summary form, by each side to the litigation and then issue a *nonbinding* 'award,' or decision, on the merits . . . . Either party may reject the award and request a *trial de novo* in the district court." Federal Judicial Center, *Guide to Judicial Management of ADR* 130 (2001) (emphasis added).

Commentators likewise recognize both the existence and legitimacy of non-binding arbitration. As one commentator explains: "Parties may provide that an arbitration is entirely non-binding. In that event, if the parties do not voluntarily comply with the award, or otherwise settle their dispute, litigation may proceed as if no arbitration proceedings had occurred." Steven C. Bennett, *Arbitration: Essential Concepts* 81 (2002); *see also* Thomas J. Stipanowich, *Commercial Arbitration at Its Best: Successful Strategies for Business Users* § 1.11, at 27 (2001) (noting the use of "non-binding abbreviated arbitration" as an alternative to binding arbitration). The term "non-binding arbitration" has also worked its way into the vernacular of arbitral administering organizations such as JAMS. *See* JAMS Glossary of ADR Terms (2001) (available at http://www.jamsadr.com/images/PDF/PressKit/jams_glossary.pdf) (last visited Jan. 28, 2004) (noting that arbitration "can be binding or non-binding," and defining "non-binding arbitration" as "[a] hearing process that looks and feels like arbitration, but is advisory and non-binding").

In sum, non-binding arbitration exists and has been accepted by this Court, the courts of appeals, Congress, commentators, and the ADR community as a valid procedure. Every court of appeals to consider the issue has held that an agreement providing for mandatory but non-binding arbitration should be enforced according to its terms.

To the extent that Safety asserts a fallback argument that the court of appeals should have applied at least a presumption that the parties here intended the arbitration decision to be binding, that argument also does not warrant review. While some courts have suggested such a presumption in dicta, they did so in the context of arbitration agreements that expressly provided for binding arbitration by incorporating American Arbitration Association rules to that effect. *See McKee v. Home Buyers Warranty Corp. II*, 45 F.3d 981, 984-85 (5th Cir. 1995); *Rainwater v. Nat'l Home*

Ins. Co., 944 F.2d 190, 193-94 (4th Cir. 1991); *P&P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 867 (10th Cir. 1999).[6] By contrast, Dow Corning and Safety neither incorporated the American Arbitration Association rules by reference nor gave any other indication that they intended an arbitral decision to be final and binding. Pet. App. 4a. Moreover, the arbitration clause in this case contains affirmative indications that the parties did not intend to give binding effect to the arbitrators' decision (*e.g.*, it provides that arbitration is a condition precedent to litigation, and it also provides for a panel composed exclusively of insurance industry insiders). *See id.* at 5a-6a. Accordingly, even if there were a well-developed circuit conflict (which there is not) on the question whether parties to an arbitration agreement presumptively intend to be bound by an arbitral decision, this case would not provide an appropriate vehicle for resolving such a conflict.

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[6] There is no indication that the parties in the other case cited by Safety for this proposition, *Chicago Typographical Union No. 16 v. Chicago-Sun Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991), contested the binding nature of the arbitration provision involved; the dispute there focused on the conduct of the arbitrator.

B. The Court of Appeals' Decision Is Consistent With This Court's Decisions Holding That Arbitration Agreements Should Be Enforced According To Their Terms.

Throughout its petition, Safety insists that the general federal policy in favor of arbitration is actually a federal policy in favor of arbitrations that yield binding awards. In advancing this supposed policy, Safety completely overlooks the primary policy behind the FAA: the enforcement of arbitration clauses according to their terms. That policy, repeatedly articulated by this Court, controls in this case.

As the Court explained in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Id.* at 476; *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) ("the central purpose of the Federal Arbitration Act [is] to ensure that private agreements to arbitrate are enforced according to their terms" (internal quotation and citation omitted)). This Court repeatedly has held that arbitration under the FAA "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479; *see also EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

This Court has recognized that the parties' intentions are of primary importance even when they conflict with other FAA policy goals, such as expedited dispute resolution. *See Volt*, 489 U.S. at 479. "The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result

is 'piecemeal' litigation." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). "After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes ... but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms, and according to the intentions of the parties." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (internal quotations and citations omitted).

Safety runs head-first into these decisions by asserting that courts should refuse to enforce the parties' intention to provide for mandatory but non-binding arbitration. The court of appeals, in contrast, adhered to the decisions of this Court by enforcing the parties' intentions as expressed in the arbitration clause. *See* Pet. App. 4a ("As this is a question of the contracting parties' intent, we begin with the terms of the arbitration clause in the insurance policies.").

C. The Court of Appeals' Application Of The Arbitration Clause At Issue In This Case Is Correct And Warrants No Further Review.

The court of appeals' fact-bound determination that the particular arbitration clause at issue in this case expresses the parties' intent to provide for mandatory but non-binding arbitration warrants no further review. The court of appeals correctly focused on the language of the arbitration clause, which differs from the many arbitration agreements that expressly provide "that the arbitration award will be 'final and binding,'" or that incorporate by reference "the rules of the American Arbitration Association or a similar arbitral body that expressly provide for binding arbitration." Pet. App. 4a; *see also Orlando*, 100 F.3d at 301 ("omission of any indication that arbitration proceedings should be final and binding" is dispositive); *Eaton v. Courtaulds of N. Am., Inc.*, 578 F.2d 87, 90 n.1 (5th Cir. 1978) (de novo judicial

review appropriate where arbitration agreement did not "explicitly make the arbitrator's decision binding on the parties"). The court of appeals noted that Safety failed to cite a single federal case "in which an arbitration agreement *entirely silent on this question* was construed as providing for binding arbitration." Pet. App. 6a (emphasis in original). Nor has Safety cited such a case in its petition.

In addition to noting the absence of language suggesting finality or a binding effect, the court of appeals recognized that the "condition precedent" language "suggests that arbitration of a policy dispute will be followed by litigation, and thus is non-binding," although the court found that this language is not conclusive. Pet. App. 5a. The court also focused on the requirement that all three arbitrators be insurance or reinsurance officials. Pet. App. 6a. The court of appeals recognized that this arrangement – borrowed from arbitration agreements between insurance companies and their reinsurers – provided "a decidedly pro-insurer 'tilt' to the proceedings," and that, at the time of contracting, a policyholder such as Dow Corning would have been "unlikely to agree that the results of such a proceeding will be binding, that is, judicially unreviewable on the merits under the FAA." *Id.*[7]

There is no basis for Safety's assertion that "[t]he Eighth Circuit's opinion will be precedent for all 'losers' to contend that arbitration is a prelude to litigation." Pet. 4; *see*

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[7] As the court of appeals noted, neither party submitted custom and usage evidence that shed light on the binding/non-binding issue. Pet. App. 5a-6a. Moreover, the court of appeals pointed out that it was Safety, not Dow Corning, that drafted the arbitration clause. Pet. App. 6a. "[T]he common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it" applies with equal force to arbitration agreements. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995).

also id. ("challenges to the binding nature of arbitration will be *de rigueur*"). The overwhelming majority of arbitration clauses leave no question one way or the other as to the final and binding nature of resulting awards. Where clauses affirmatively recognize a right to sue and fail to provide for final and binding awards, the Eighth Circuit opinion – together with the opinions of the Third, Fourth, and Ninth Circuits – will have the salutary effect of discouraging companies in Safety's position from trying to deprive litigants of a judicial forum in instances where they have not agreed that arbitration decisions will be final and binding.

The court of appeals' analysis of Safety's arbitration clause in this case and in *Shook & Fletcher* is entirely reasonable and does not conflict with the decisions of this Court or any other court of appeals. Nor does it have any far-reaching consequences for other arbitrating parties. Ultimately, this is a localized dispute concerning certain Safety insurance policies that warrants no further review.

II. THE EIGHTH CIRCUIT CORRECTLY DETERMINED THAT THE PARTIES DID NOT AGREE TO SUBMIT THE BINDING/NON-BINDING ISSUE TO THE ARBITRATORS.

The court of appeals and the district court both held that Dow Corning and Safety had not agreed to submit the question of whether their arbitration was binding or non-binding to the arbitrators, and therefore the issue was for the court to decide independently. *See* Pet. App. 8a ("The arbitrators doubtless exceeded their authority in declaring their decision to be binding, because that issue goes to the scope of their authority."); Pet. App. 38a ("The policy provision, however, does not state that it is within the arbitrators' authority to determine whether their decision is binding. Therefore, pursuant to *First Options*, this court will decide the issue 'independently.'"). The court of appeals' resolution of this issue is correct and does not conflict with

any decision of this Court or another court of appeals. No further review is warranted.

A. No Circuit Split Exists On The Question Of Who Decides Whether An Arbitration Award Is Binding.

Notably absent from the petition is any hint of a circuit split on the question of who decides whether an arbitration award is binding. In fact, the only circuits that have squarely decided the issue – the Eighth Circuit in the instant case and in *Shook & Fletcher*, and the Third Circuit in *Orlando* – both have held that the binding/non-binding determination belongs to the court. *See Dow Corning*, 335 F.3d at 747 (Pet. App. 8a); *Shook & Fletcher*, 2003 WL 22391526, at *1 ("the issue whether the parties contracted for binding or non-binding arbitration went to the scope of the arbitrators' authority and was therefore beyond their authority to resolve") (Pet. App. 98a-99a); *Orlando*, 100 F.3d at 300 ("because the court must determine the duty to arbitrate from an interpretation of the collective bargaining agreement, it also has the task of determining the dispositive effect to be given to an award – again, by construing the contract").

This result is consistent with decisions of other circuits holding more generally that a court decides questions of arbitrator authority and jurisdiction absent a clear agreement to the contrary. *See, e.g., Carson v. Giant Food, Inc.*, 175 F.3d 325, 330 (4th Cir. 1999) ("if contracting parties wish to let an arbitrator determine the scope of his own jurisdiction, they must indicate that intent in a clear and specific manner"); *Gen. Motors Corp. v. Pamela Equities Corp.*, 146 F.3d 242, 248 (5th Cir. 1998) ("the law creates a presumption that the parties did not agree to submit any question as to the arbitrator's own power to that very same arbitrator"); *Int'l Ass'n. of Machinists & Aerospace Workers*

v. Gen. Elec. Co., 865 F.2d 902, 904 (7th Cir. 1989) ("[t]he arbitrator is not the judge of his own authority").

These judicial authorities, in turn, are consistent with the text of Section 9 of the FAA itself, which provides that "*[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration*, and shall specify the court, then at any time within one year after the award is made any party to the arbitration *may apply to the court so specified for an order confirming the award* . . . ." 9 U.S.C. § 9 (emphasis added). The first italicized phrase indicates that the parties must affirmatively agree that a judgment of the court shall be entered upon the award made, *i.e.*, that the award will be binding. The arbitration clause at issue in this case includes no such provision. The second italicized phrase indicates that it is judicial confirmation that makes an arbitration award enforceable, and therefore a court alone has the power to give an arbitration award binding effect.

Safety's own authorities confirm that the court of appeals' decision is correct. Not one of the cases cited by Safety in the petition involves a court deferring to the decision of an arbitrator on the binding/non-binding issue. To the contrary, every opinion cited by Safety ostensibly for implicating a binding/non-binding issue involves a court – and *not* an arbitrator – making the binding/non-binding determination.[8] Safety's contention that the arbitrator decides, absent a specific directive to that effect from the parties, is not the law anywhere.

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[8] *See, e.g., P & P Industries, Inc. v. Sutter Corp.*, 179 F.3d 861, 867-68 (10th Cir. 1999); *Rainwater v. Nat'l Home Ins. Co.*, 944 F.2d 190, 192-94 (4th Cir. 1991); *McKee v. Home Buyers Warranty Corp. II*, 45 F.3d 981, 983-84 (5th Cir. 1995).

B. The Eighth Circuit's Decision Does Not Conflict With This Court's Arbitrability Decisions.

Safety's claim that this Court's decisions dictate a contrary result is without merit. Because arbitration is "simply a matter of contract between the parties," this Court repeatedly has held that "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration." *First Options*, 514 U.S. at 945; *see also AT & T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-49 (1986). Where, as here, the question is whether the parties have agreed to allow the arbitrators to "decide the scope of their own powers," the presumption under this Court's precedents is that they have not. *First Options*, 514 U.S. at 945. It follows that, absent "clear and unmistakable" evidence of contrary intent, a court, not the arbitrator, decides the scope of the arbitrator's authority. *Id.* This is precisely what the Eighth Circuit has done here by answering the binding/non-binding question itself.[9]

Nothing in this Court's more recent pronouncements on arbitrability alters this result. Safety alleges a conflict between the court of appeals' decision and a trio of recent decisions by this Court: *Pacificare Health Systems, Inc. v. Book*, 538 U.S. 401, 123 S. Ct. 1531 (2003); *Green Tree Financial Corp. v. Bazzle*, 123 S. Ct. 2402 (2003); and *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). But none of these cases presented the issue decided by the

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[9] Safety contends that because the arbitration clause called for the parties to arbitrate "any dispute" between them, the arbitrators and not the court were to determine whether the arbitration would be binding. Pet. 10-11. This unsupported assertion is undermined by *First Options* itself, where the clause in question similarly provided for the arbitration of "any controversy" arising out of the agreement between the parties. *See* Br. for Pet., *First Options Inc. v. Kaplan*, No. 94-560, at 4.

court of appeals – namely, whether the court or the arbitrators should decide whether the parties have agreed to binding arbitration. *Pacificare* involved the ability of arbitrators to award treble damages under the RICO statute, and the Court specifically declined to reach the ultimate arbitrability issue. *See* 123 S. Ct. at 1534-36. *Green Tree* dealt with the authority of arbitrators to order class arbitration, 123 S. Ct. at 2407, and *Howsam* concerned the power of arbitrators to interpret and apply the statute of limitations provision in the arbitration rules of the National Association of Securities Dealers, 537 U.S. at 82-83.[10] Because these issues are not presented in the instant case, there is no conflict.

To the extent that Safety tries to cast doubt on the court of appeals' decision by extrapolating from this Court's recent decisions an abstract principle governing the division of authority between courts and arbitrators, this effort also fails. This Court has not announced any principle, abstract or otherwise, that would dictate sending the binding/non-binding issue to the arbitrators under the arbitration terms agreed upon by Dow Corning and Safety If there is any principle to be gleaned from the Court's recent holdings, it is that whether a given issue is for the court or for the arbitrators to decide comes down to what the parties would have expected at the time of contracting. *See Pacificare*, 123 S. Ct. at 1536 n.2 (decision by a court is appropriate in the first instance "where contracting parties would likely have expected a court to have decided the gateway matter, where

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[10] Like most arbitration clauses today, the clause in *Green Tree* provided for the resolution of disputes "by *binding* arbitration" – language missing from Safety's policies. *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402, 2405 (2003) (emphasis added). Similarly, the clause in the provision at issue in *First Options* stated that "[t]he parties hereto and all who may claim under them shall be conclusively bound by such arbitration." Br. for Pet. in No. 94-560, at 4.

they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate" (quoting *Howsam*, 537 U.S. at 83-84)). It is untenable to suggest that Dow Corning and Safety – having agreed to non-binding arbitration as a prelude to litigation – would have intended for arbitrators to have the power preemptively to declare their decisions to be binding. No further review is warranted.[11]

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[11] Safety's petition frames a third question presented concerning the standard of review applied by the court of appeals. *See* Pet. i. In fact, this third question adds nothing to the first two questions presented. To the extent Safety contends that the court of appeals applied the wrong standard of review to the decision of *the district court*, this contention is not well developed in the petition and is entirely erroneous. The court of appeals correctly applied ordinary standards of appellate review, as prescribed by this Court in *First Options*. *See First Options*, 514 U.S. at 948 ("courts of appeals should apply ordinary, not special, standards when reviewing district court decisions upholding arbitration awards"). To the extent Safety contends that the court of appeals applied the wrong standard of review to the decision of *the arbitrators*, this is simply another way of saying that the arbitrators, not the court, had the power to decide the binding/non-binding issue. Precisely because the binding/non-binding issue was properly for the court under the parties' agreement, the Eighth Circuit was not bound to defer to the arbitrators' *ultra vires* ruling on the issue. *See id.* at 943 ("If, on the other hand, the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely independently.").

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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January 2004

APPENDIX

11. Arbitration: As a condition precedent to any right of action under this Policy, any dispute arising out of this Policy shall be submitted to the decision of a board of arbitration. The board of arbitration will be composed of two arbitrators and an umpire, meeting in St. Louis, Missouri, unless otherwise agreed.

The members of the board of arbitration shall be active or retired, disinterested officials of insurance or reinsurance companies. Each party shall appoint its arbitrator, and the two arbitrators shall choose an umpire before instituting the hearing. If the respondent fails to appoint its arbitrator within four weeks after being requested to do so by the claimant, the latter shall also appoint the second arbitrator. If the two arbitrators fail to agree upon the appointment of an umpire within four weeks after their nominations, each of them shall name three, of whom the other shall decline two and the decision shall be made by drawing lots.

The claimant shall submit its initial brief within twenty (20) days from appointment of the umpire. The respondent shall submit its brief within twenty (20) days after receipt of the claimant's brief and the claimant may submit a reply brief within ten (10) days after receipt of the respondent's brief.

The board shall make its decision with regard to the custom and usage of the insurance and reinsurance business. The board shall issue its decision in writing based upon a hearing in which evidence may be introduced without following strict rules of evidence but in which cross examination and rebuttal shall be allowed.

If more than one Insured is involved in the same dispute, all such Insureds shall constitute and act as one party for purposes of this Clause and communications shall be made by the Company to each of the Insureds constituting the one party; provided, however, that nothing therein shall impair

the rights of such Insureds to assert several, rather than joint, defenses or claims, nor be construed as changing the liability of the Insureds under the terms of this Policy from several to joint.

Each party shall bear the expense of its own arbitrator and shall jointly and equally bear with the other party the expense of the umpire. The remaining costs of arbitration shall be allocated by the board.

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(3)

No. 03-790

IN THE

Supreme Court of the United States

SAFETY NATIONAL CASUALTY CORPORATION,

Petitioner,

v.

DOW CORNING CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT UNDER RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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REPLY

I. The Eighth Circuit's Decision Conflicts With The Court's Arbitration Precedent: An Arbitrator, And Not The Court, Decides What Kind Of Arbitration Proceeding The Parties Have Agreed To, Including All Procedural Matters Affecting The Arbitration's Final Disposition.

Dow Corning's Brief in Opposition is telling. Dow Corning spends pages addressing the distinction between binding and non-binding arbitration[1], but never addresses the central issue presented by Safety's Petition, namely, the conflict between the Eighth Circuit's decision and the Court's decision in *Green Tree Fin. Corp. v. Bazzle*, __ U.S. __, 123 S. Ct. 2402 (2003). Moreover, Dow Corning does not touch upon the prevalence of Safety's arbitration clause in the insurance field or how the Eighth Circuit's decision will disrupt the final and binding resolution of disputes through arbitration by opening up the courts to challenges by "losers" who will contend that arbitration is nothing more than a non-binding prelude to litigation.

The reason for Dow Corning's silence is simple. The Eighth Circuit's decision cannot survive *Green Tree*, the Court's most recent arbitration precedent.

In *Green Tree*, the Court distinguished between questions of arbitrability – which are for a court to decide – and questions of substance and arbitration procedure – which are for an arbitrator to decide. The Court has narrowly defined the question of arbitrability as whether the parties agreed in their contract to arbitrate a particular dispute. *AT&T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, 649 (1986). The Court has emphasized the question is one of "limited scope" and applies to "gateway" matters only. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). The question concerns the validity of an arbitration clause or its application to an underlying dispute. *Green Tree*, 123 S. Ct. at 2407.

1. Safety freely acknowledges the distinction.

Arbitrability, however, does not embrace matters of contract interpretation and arbitration procedure. *Id.* Nor does arbitrability address "what *kind of arbitration proceeding* the parties agreed to." *Id.* (emphasis in original). These questions are reserved for the arbitrator to decide. Once a court concludes a dispute is arbitrable, all other questions are for the arbitrator to resolve, including procedural questions that grow out of the dispute and which affect its "final disposition." *Howsam*, 537 U.S. at 84 (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)).

The "final and binding" issue, which the arbitrators decided in this case, is not a question of arbitrability. The issue concerns what kind of arbitration proceeding the parties agreed to and constitutes a matter of contract interpretation and arbitration procedure. *Green Tree*, 123 S. Ct. at 2407. As a procedural question affecting the "final disposition" of the parties' dispute, it was a matter reserved for the arbitrators' exclusive determination. *Howsam*, 537 U.S. at 84. The Court's arbitration jurisprudence permits no other conclusion.

Contrary to Dow Corning's argument, the parties did agree to submit the binding/non-binding issue to the arbitrators. Brief in Opp. 14-19. This determination did not exceed the arbitrators' authority. Dow Corning and Safety agreed to arbitrate *any* dispute arising out of the policies. Pet. App. 4a-5a. Whether the policies called for binding or non-binding arbitration was a matter of contract interpretation and arbitration procedure that arose from the policies. It was rightly decided by the arbitrators.

The Court has stated quite plainly that matters of procedure lie solely within the arbitrator's discretion. *John Wiley & Sons, Inc.*, 376 U.S. at 557. As reaffirmed by the Court in *Green Tree*, "[a]rbitrators are well situated to answer" questions of contract interpretation and arbitration procedure. 123 S. Ct. at 2407. Moreover, "[t]he [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself" or a defense

to arbitrability. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). This is true even where the scope of the arbitration clause is ambiguous. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995).

This case was not one where the arbitrators exceeded their authority by resolving a dispute that was not subject to a valid arbitration agreement. Rather, they decided a question of procedure and contract interpretation, which rests within their exclusive province.

A. Questions Of Contract Interpretation And Arbitration Procedure Are For The Arbitrator To Decide.

In opposition, Dow Corning invites the Court to engage in contract interpretation to decide the "final and binding issue," a procedural question addressing the "final disposition" of the parties' dispute. Brief in Opp. 12-14. Contrary to Dow Corning's argument and the Eighth Circuit's decision, the issue is not controlled by the Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). Brief in Opp. 12, 17. Dow Corning's reliance on *First Options* is misplaced and confuses the nature of an arbitrability determination. Unlike this case, *First Options* involved a "gateway" question of arbitrability, namely, whether the parties had agreed to arbitrate the issue of arbitrability. 514 U.S. at 942.

Here, there is no dispute that Dow Corning and Safety had agreed to arbitrate any disputes arising out of the insurance policies. Pet. App. 4a-5a. Before this Court, Dow Corning does not argue otherwise.

Instead, Dow Corning presses the Court to construe the arbitration provision, as did the Eighth Circuit, and find that the parties' agreement did not provide for binding arbitration. Brief in Opp. 11-12. However, on a procedural question involving matters of contract interpretation, a court has no role. *Green Tree*, 123 S. Ct. at 2407; *John Wiley & Sons, Inc.*, 376 U.S. at 557. A reviewing court must affirm an arbitration award

so long as the arbitrators are even arguably construing or applying the contract and acting within the scope of their authority. *United Paperworkers Intern'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987). Indeed, a reviewing court must affirm even if it is convinced the arbitrators have "committed serious error." *Id.*

B. The Phrase "Condition Precedent" Does Not Provide For Non-Binding Arbitration.

Dow Corning's focus on the "condition precedent" language in the arbitration clause does not compel a different conclusion. Brief in Opp. 10, 13. The arbitrators correctly construed the language in light of the circumstances surrounding its drafting. "While this language might be unartful and anachronistic, it does not denote non-binding arbitration." *McKee v. Home Buyers Warranty Corp. II*, 45 F.3d 981, 986 (5th Cir. 1995). Instead, the phrase applies to the confirmation process permitted by 9 U.S.C. § 9 or to other litigation in which the arbitration would be final, but part of a larger litigation context. *Rainwater v. National Home Ins. Co.*, 944 F.2d 190, 194 (4th Cir. 1991); *McKee*, 45 F.3d at 985-86.

In *Rainwater*, the arbitration clause contained "condition precedent" language like Safety's policies: "The voluntary dispute settlement process provided herein shall be a *condition precedent to the commencement* of any litigation by any party to compel compliance with the warrant documents or to seek relief for any dispute arising out of this program." 944 F.2d at 192 (emphasis added). The Fourth Circuit disposed of the argument that the "condition precedent" language meant non-binding arbitration, explaining:

> Though NHIC's claim has some surface appeal, we think that the "condition precedent" language cannot carry all the weight NHIC would ascribe to it. Traditionally, federal courts were hostile to arbitration clauses since it was thought they could be avoided at the whim of either party. As a result,

> parties frequently included "condition precedent" language to make certain that the arbitration process ran its course before a federal court could entertain a suit. *Therefore, we read "condition precedent" to some extent as an artifact left over from the days of hostility toward arbitration. To the extent that the phrase has meaning, we find that it does not undermine the binding nature of arbitration*, but instead applies to the confirmation process permitted by 9 U.S.C. § 9, or to other litigation in which the arbitration award would be final but just a sub-text in some larger litigation context.

944 F.2d at 194 (citations omitted) (emphasis added).

The Fifth Circuit is in accord. In *McKee*, the arbitration clause provided: "The dispute settlement process *shall precede any litigation* attempted by either party on items that are specifically included in this warranty." 45 F.3d at 983 n.2 (emphasis added). The Fifth Circuit rejected the argument that this language made the parties' arbitration non-binding:

> We think this "federal policy favoring arbitration" covers more than simply the substantive scope of the arbitration clause – i.e., whether the Kilpatricks' claims were properly submitted to arbitration – and encompasses an expectation that such procedures will be binding. As a matter of federal law, the language of the warranty agreement is not sufficiently specific to call for non-binding arbitration.

Id. at 985.

These authorities demonstrate the arbitration clause in Safety's policies confirmed the parties' intent to resolve their disputes by binding arbitration. The "condition precedent" language, which was written in the years when many jurisdictions were still hostile to arbitration as an alternative to litigation, does not express the parties' intention to engage in a

"non-binding" process. In the context of an insurance coverage dispute arising from a complex mass tort, a non-binding process taking many years to resolve would be a great waste of money and energy if the exercise decided nothing and was merely a prelude to litigation. Read in context, the language "condition precedent to any right of action" refers to the "offensive" use of an arbitration award, *i.e.*, execution on or the enforcement of a money judgment, and does not constitute an agreement to engage in non-binding arbitration.

Contrary to Dow Corning's argument, the absence of words specifying "final and binding" arbitration is of no import. Brief in Opp. 11. Magic words are not necessary to make an arbitration binding. *Rainwater*, 944 F.2d at 193. Rather, in the case of a non-binding procedure, the opposite is true. There must be specific language in the agreement that calls for non-binding arbitration. *McKee*, 45 F.3d at 985. In the absence of such language, the expectation is that the arbitration will be binding. *Id.*

This is true here. There is no express language providing for non-binding arbitration in Safety's policies.

Dow Corning's attempt to distinguish *Rainwater* and *McKee* on the ground the arbitration clauses in those cases incorporated American Arbitration Association rules does not advance its position. Brief in Opp. 9-10. Safety's clause had a similar provision. In deciding the case, the arbitrators were bound to make their "decision with regard to the custom and usage of the insurance and reinsurance business." Pet. App. 5a. The agreement's incorporation of insurance and reinsurance custom and usage is indistinguishable from those agreements that incorporate American Arbitration Association rules. The fact there was no custom and usage evidence in the record is irrelevant. The insurance custom and usage were self-proving. By unanimously finding the arbitration binding, the three arbitrators necessarily followed insurance and reinsurance

custom and usage, of which they were experts.[2] Pet. App. 5a. The board's members were "active or retired, disinterested officials of insurance or reinsurance companies." *Id.*

Dow Corning's invitation to construe the arbitration agreement against Safety because it was the drafter should also be rejected. Brief in Opp. 13 n.7. The Court's precedent makes plain that matters of contract interpretation are for an arbitrator to decide. *Green Tree*, 123 S. Ct. at 2407. Moreover, this case is not one in which the rule of *contra proferentem* is applicable. The rule does not apply to sophisticated contractors, including corporations of immense size that are managed by professionals and guided by counsel on the same level as the insurer. *Eagle Leasing Corp. v. Hartford Fire Ins. Co.*, 540 F.2d 1257, 1261 (5th Cir. 1976); *Koch Engineering Co., Inc. v. Gibraltar Cas. Co.*, 878 F. Supp. 1286, 1288 (E.D. Mo. 1995), *aff'd*, 78 F.3d 1291 (8th Cir. 1996) (applying Missouri law).

C. Dow Corning's Authorities Are Immaterial To The Question Presented.

Dow Corning's recitation of authorities addressing non-binding procedures does not compel a contrary conclusion. Brief in Opp. 5-9. A cursory review of these authorities demonstrates they are inapplicable on their face.

The Court should declare, consistent with decisions by the Fourth, Fifth, and Tenth Circuits, that binding arbitration is presumed, absent specific language demonstrating that the parties intended a non-binding proceeding. There is a presumption of binding arbitration under the FAA, absent a clear indication that the parties intended a non-binding process. *Rainwater*, 944 F.2d at 192-94; *McKee*, 45 F.3d at 985; and

2. Even the arbitrator who ruled for Dow Corning on the merits joined the other two arbitrators in concluding the arbitration was binding. Pet. App. 86a, 89a. Similarly, in *Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp.*, No. 03-1092, 2003 WL 22391526 (8th Cir. Oct. 21, 2003), a different thee-member arbitration panel concluded their award was binding, although the panel's decision on certain coverage issues was not unanimous.

P & P Indus., Inc. v. Sutter Corp., 179 F.3d 861, 866 (10th Cir. 1999). *See also Wabash Ry. Co. v. American Refrigerator Transit Co.*, 7 F.2d 335, 351 (8th Cir. 1925) (arbitration carries with it "an implied agreement to be bound").

In this case, the Eighth Circuit observed that binding arbitration is the norm under the FAA. Pet. App. 9a. Indeed, one circuit has concluded that non-binding proceedings fall outside the FAA's confines, holding where the dispute resolution process is not final and binding, the process is removed "from the warmth of the FAA blanket." *Dluhos v. Strasberg*, 321 F.3d 365, 372 (3d Cir. 2003).

Consider now the cases cited by Dow Corning. Dow Corning's leading authority, *United States v. Bankers Ins. Co.*, 245 F.3d 315 (4th Cir. 2001), an action brought by the Federal Emergency Management Agency against an insurer that sold and administered flood insurance policies for violations of the False Claims Act, amongst other claims, does not support its position. Brief in Opp. 5-6. The decision is inapposite. As pointed out by the Fourth Circuit, the National Flood Insurance Act, "specifically precludes arbitration that is binding on the Government." *Id.* at 321, *citing* 42 U.S.C. § 4083(b).

No similar expression of federal policy applies to the contracts between Dow Corning and Safety. The Fourth Circuit's decision in *Bankers Ins. Co.* does not call into question its decision in *Rainwater*, in which the same court held there is a "presumption that one submits to arbitration, . . . , precisely *because of* the binding quality of the process." 944 F.2d at 192 (emphasis in original). Indeed, the congressional policy that underlies this case is the very opposite of the one addressed in *Banker Ins. Co.* That policy favors and encourages arbitration precisely because it is a speedy, inexpensive, and efficient way to resolve disputes without litigation. *Rainwater*, 944 F.2d at 192.

Dow Corning's citation to *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998), is equally irrelevant. Brief in Opp. 6. Unlike this case, *Wolsey, Ltd.*, involved a contract that expressly provided for non-binding arbitration. 144 F.3d at 1207.[3]

Similarly, Dow Corning's citation to cases decided by this Court does not advance its position or eliminate the conflict between the Eighth Circuit's decision and the Court's most recent arbitration precedent. Brief in Opp. 7-8. Two cases, *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986), and *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998), concern the rights of *nonunion members* to challenge the calculation and collection of agency shop fees. These cases have no application here. Unlike this case, the nonunion employees were not parties to the agreements that prescribed the arbitration procedure to resolve their fee disputes; therefore, the nonunion employees never submitted to the arbitration process as their exclusive means of redress.

Dow Corning's citation to *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Bartnicki v. Vopper*, 532 U.S. 514 (2001), is likewise deficient. Brief in Opp. 8. Both cases concern agreements that expressly provided for non-binding arbitration.

Finally, Dow Corning's reference to alternative dispute resolution under 28 U.S.C. §§ 654-657 does not govern the federal policy for binding arbitration under the FAA. Brief in Opp. 8. The arbitration procedures enacted by Congress are consensual and specifically provide for a trial *de novo* in the district court. 28 U.S.C. §§ 654(b)(1), 657(c). Therefore, these procedures supply no guidance for review of an agreement subject to the FAA, which provides that any dispute arising out of the parties' contracts shall be submitted to a board of arbitration. Pet. App. 4a-5a.

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3. To the extent *Wolsey, Ltd.*, holds the FAA applies to non-binding proceedings, it is in conflict with the Third Circuit's decision in *Dluhos v. Strasberg*, 321 F.3d 365, 371-72 (3d Cir. 2003).

CONCLUSION

Certiorari in necessary to resolve the conflict between the Eighth Circuit's decision and the Court's arbitration precedent. Contrary to the Eighth Circuit's decision, once "gateway" issues of arbitrability are resolved in favor of arbitration, all other matters of contract interpretation and arbitration procedure are for an arbitrator – and not the court – to decide, including questions affecting the arbitration's final disposition. *Green Tree*, 123 S. Ct. at 2407; *Howsam*, 537 U.S. at 84. These are issues arbitrators "are well situated to answer." *Green Tree*, 123 S. Ct. at 2407. They are not reserved for a court to decide.

Moreover, by creating an "insurance" exception to the presumption that binding arbitration is the norm, the Eighth Circuit has destroyed the efficacy of arbitration clauses in insurance policies and reinsurance contracts, many of which provide that arbitration is a "condition precedent" to litigation. Pet. App. 6a. Although Dow Corning and Safety agreed to arbitrate any dispute arising out of their contracts, their arbitration has become nothing more than an expensive and time-consuming prelude to litigation. Because of the Eighth Circuit's decisions in this case and *Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp.*, No. 03-1092, 2003 WL 22391526 (8th Cir. Oct. 21, 2003), other parties to insurance policies and reinsurance treaties must question whether they can rely on arbitration as an efficient and expeditious procedure to resolve their disputes without recourse of litigation. Therefore, the writ of certiorari should issue.

Respectfully submitted,

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Attorneys for Petitioner

Supreme Court, U.S.
FILED
MAR 16 2004
OFFICE OF THE CLERK

No. 03-790

IN THE

Supreme Court of the United States

SAFETY NATIONAL CASUALTY CORPORATION,

Petitioner,

v.

DOW CORNING CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR REHEARING

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Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp., No. 03-1092, 2003 WL 22391526 (8th Cir. Oct. 21, 2003), *pet. for writ of certiorari docketed sub nom. Safety Nat'l Cas. Corp. v. Shook & Fletcher Asbestos Settlement Trust*, No. 03-1221 (filed Feb. 23, 2004) 1, 2

PETITION FOR REHEARING

Petitioner Safety National Casualty Corporation, for its Petition for Rehearing, states:

1. On March 1, 2004, the Court denied Safety's Petition for Writ of Certiorari.

2. Safety requests the Court to rehear this matter because of intervening circumstances following the docketing of its Petition on December 3, 2003.

3. On February 23, 2004, Safety filed a Petition for Writ of Certiorari in *Safety National Casualty Corporation v. Shook & Fletcher Asbestos Settlement Trust*, No. 03-1221. On February 26, 2004, the Court docketed Safety's Petition in No. 03-1221.

4. By letter dated February 24, 2004, Safety requested that its Petitions filed in Nos. 03-790 and 03-1221 be vided on the Court's calendar because the two cases, which address the same arbitration provision, present identical questions for the Court's review, including whether the decisions of the United States Court of Appeals for the Eighth Circuit in the two cases conflict with the Court's decision in *Green Tree Fin. Corp. v. Bazzle*, __ U.S. __, 123 S. Ct. 2402 (2003). A copy of Safety's correspondence of February 24, 2004, is attached to this Petition as Exhibit A.

5. Safety seeks rehearing because it is uncertain whether the Court considered, or had the opportunity to consider, Safety's request that Nos. 03-790 and 03-1221 be vided on the Court's calendar before denying Safety's Petition in No. 03-790 on March 1, 2004. Safety is concerned that if certiorari is denied in 03-790 but granted in 03-1221 inconsistent results will occur. Therefore, Safety requests the Court to rehear this matter so that this case may be considered by the Court with No. 03-1221 in light of Safety's request that this case be vided with No. 03-1221 on the Court's calendar.

Wherefore, Petitioner Safety National Casualty Corporation requests the Court to rehear the Court's Order of March 1, 2004, which denied Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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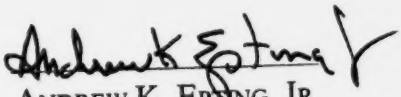
CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.



ANDREW K. EPTING, JR.

EXHIBIT A — CORRESPONDENCE OF PETITIONER'S COUNSEL ADDRESSED TO THE COURT, DATED FEBRUARY 24, 2004

Brown & James P.C.
Law Firm

February 24, 2004

By Federal Express

Honorable Christopher W. Vasil
Chief Deputy Clerk of the Court
Supreme Court of the United States
One First Street
Washington, D.C. 20543-0001

In re: Safety Nat'l Cas. Corp. v. Dow Corning Corp.
Supreme Court No.: 03-790
United States Court of Appeals, Eighth Circuit,
Appeal No. 02-2048

Safety Nat'l Cas. Corp. v. Shook & Fletcher
Asbestos Settlement Trust
Supreme Court No.: _____
United States Court of Appeals, Eighth Circuit,
Appeal No. 03-1092

Dear Mr. Vasil:

We are co-counsel for Petitioner Safety National Casualty Corporation in the above cases. The two matters are before the Court on separate Petitions for a Writ of Certiorari. The Petition in *Dow Corning* was filed on November 26, 2003,

Exhibit A

and is set for conference on February 27, 2004. The Petition in *Shook & Fletcher* was filed under Supreme Court Rule 29.2 on February 23, 2004.

The two cases, which address the same arbitration provision, present identical questions for the Court's review. Therefore, we request on Petitioner's behalf that these cases be vided on the Court's calendar.

Thank you for your consideration of this request.

Very truly yours,

T. Michael Ward

TMW/mah

cc: Mr. Andrew K. Epting
Counsel for Petitioner

Mr. Mitchell F. Dolin
Counsel of Record for Respondent
Dow Corning Corporation
(By Federal Express)

Mr. David E. Finkelson
Co-Counsel for Respondent Dow Corning Corporation
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Exhibit A

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Co-Counsel for Respondent Shook & Fletcher Asbestos Settlement Trust
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